

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 378

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KENNETH J. MULLANE, AS SPECIAL GUARDIAN  
AND ATTORNEY, ETC., APPELLANT,

vs.

CENTRAL HANOVER BANK AND TRUST COM-  
PANY, AS TRUSTEE, ETC., ET AL.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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FILED OCTOBER 7, 1949.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

In the Matter of the Judicial Settlement of the Account of Proceedings of **CENTRAL HANOVER BANK AND TRUST COMPANY**, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

**KENNETH J. MULLANE**, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

**CENTRAL HANOVER BANK AND TRUST COMPANY**, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

**JAMES N. VAUGHAN**, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents

**STATEMENT UNDER RULE 234**

The appellant herein appeals from (1) the order of the [fol. 2] Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, made and entered in the office of the Clerk of said Surrogate's Court on the 26th day of November, 1947; (2) portions of

the final decree of voluntary accounting entered in the office of the aforementioned Surrogate's Court on the 12th day of August, 1948; and (3) so much of the order on remittitur entered in the office of the Clerk of the aforementioned Surrogate's Court on the 12th day of August, 1948, as adjudges that the Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee.

This proceeding was commenced by the filing in the Surrogate's Court, New York County, on March 28, 1947, of the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, for the period from January 31, 1946, the date of the establishment of said Trust Fund, to and including January 30, 1947, and by the filing in said Court on the same day of the petition of said Central Hanover Bank and Trust Company, as Trustee as aforesaid, verified March 27, 1947, wherein said Trustee sought, among other things, a judicial settlement of said account of proceedings, and by the issuance by said Court on March 28, 1947 of its citation returnable May 2, 1947.

By order of said Court dated March 31, 1947, Kenneth J. Mullane was appointed Special Guardian and Attorney [fol. 3] herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the income of said Trust Fund.

By order of said Court dated March 31, 1947, James N. Vaughan was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the principal or capital of said Trust Fund.

On May 27, 1947, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, appearing specially, served his preliminary report and answer, verified May 26, 1947, wherein said Special Guardian raised certain objections to the jurisdiction of the said Surrogate's Court.



On June 3, 1947, James N. Vaughan, as Special Guardian and Attorney as aforesaid, served his preliminary report, verified June 2, 1947, wherein said Special Guardian requested that the objections raised by said Kenneth J. Mullane be dismissed.

The names of all the parties hereto are hereinabove set forth in full.

[fol. 4] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION

[Title omitted]

Please Take Notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Appellate Division of the New York Supreme Court in and for the First Department from the intermediate decree of voluntary accounting entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 26th day of November, 1947, and that this appeal is taken on the law and [fol. 5] the facts from each and every part of said intermediate decree, as well as from the whole thereof.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office and Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York, James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 6] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY  
 INTERMEDIATE DECREE OF VOLUNTARY ACCOUNTING APPEALED  
 FROM—November 26, 1947

Present—Honorable William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946 established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that the said first account of proceedings be judicially settled and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New [fol. 7] York addressed generally without naming them to the persons interested in said Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described Trusts and Estates participants therein:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Aruthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston

[fol. 8] Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeanette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the Will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

[fol. 9] Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

[fol. 10] Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy William's Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I.



[fol. 11] Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeanette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated June 9, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

[fol. 12] Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will

of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

[fol. 13] Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

[fol. 14] Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr., (Charles C. Lee is co-Trustee).

[fol. 15] Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

[fol. 16] Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGrafenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

[fol. 17] Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.



Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

[fol. 18] Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

[fol. 19] Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

Citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereon upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947 for [fol. 20] each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who did not otherwise appear in this proceeding who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund, No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947 for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who did not otherwise appear in this proceeding who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Bankin Law of the State of New York having filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as

Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of [fol. 21] application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts and since this Court had no jurisdiction over inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceeding and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as such Special Guardian and Attorney aforesaid, it is on motion of Rathbone, Perry, Kelley & Drye, Albert B. Maginnes of Counsel, attorneys for the petitioner herein,

[fol. 22] Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who has not otherwise appeared in this proceeding who has, or may hereafter have, any interest in the

income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States.

William T. Collins, Surrogate.

[fol. 23] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

PETITION FOR VOLUNTARY ACCOUNTING—March 27, 1947

To the Surrogate's Court of the County of New York:

The petition of Central Hanover Bank and Trust Company, having its principal office at No. 70 Broadway, Borough of Manhattan, City, County and State of New York, respectfully shows and alleges:

First: That, heretofore and on the 18th day of December, 1945, your petitioner's Discretionary Common Trust Fund No. 1 was approved and adopted by resolution of the Board of Trustees of your petitioner and was established on January 31, 1946, under Plan of Operation dated December 20, 1945, pursuant to certificate of authority of the Banking Board of the State of New York dated December 12, 1945.

Second: Your petitioner has since conducted the operation of said Fund pursuant to the Plan of Operation dated December 20, 1945, Section 100-c of the Banking Law of the State of New York, the regulations of the Banking Board of



the State of New York relating to Common Trust Funds, and the regulations of the Board of Governors of the Federal Reserve System likewise relating to such funds.

Third: The name or designation by which said Fund is known is the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

[fol. 24] Fourth: No judicial settlement of any prior account of your petitioner in relation to said Fund has been had.

Fifth: The accounting herein covers the period from the date said Fund was established as aforesaid to and including the 30th day of January, 1947.

Sixth: A list of all of the participating estates, trusts or funds, any part of which has been invested in such Fund, and the names of all other persons acting jointly with your petitioner in a fiduciary capacity in respect of any such participating estates, trusts or funds are as follows:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

[fol. 25] Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

[fol. 26] Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilio Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

[fol. 27] — Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguiro, Mary Bourgeau, John T. Hurley, Leonidas Davis, [fol. 28] Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeanette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

[fol. 29] Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated [fol. 30] May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Condran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

[fol. 31] Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).



Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

[fol. 32] Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

[fol. 33] Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931, and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGraf-fenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and [fol. 34] amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

[fol. 35] Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

[fol. 36] Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

Seventh: Your petitioner has retained Messrs. Rathbone, Perry, Kelley & Drye to render the legal services necessary in the preparation and settlement of this account. Your petitioner requests that the Court fix and allow compensation of said firm for such legal services in the sum of \$2,000 plus their proper disbursements.

Eighth: Article VII, Section 7.1, paragraphs two and four of the Plan of Operation of said Discretionary Common Trust Fund No. 1 provide as follows:

"There shall be credited to principal all rights received or the proceeds of sale thereof, all profits

realized on the sale of investments, all stock dividends and such part of any extraordinary or liquidating dividend as shall constitute principal, together with all other principal credits. There shall be charged against principal all losses on the sale of investments and all expenses properly chargeable to principal, including any taxes and assessments chargeable to the principal of the Common Fund pursuant to any statute or regulation."

[fol. 37] "There shall be credited to income all interest accrued or received and ordinary cash dividends declared or received and such part of any extraordinary or liquidating dividend as shall constitute income, as well as any other proper income credits. There shall be charged against income account all expenses due and accrued properly chargeable to income, including any taxes and assessments chargeable to the income of the Common Fund pursuant to any statute or regulation."

Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received.

[fol. 38] Your petitioner is desirous of rendering to this Court an account of its proceedings, and therefore prays that said account be judicially settled, that all necessary and proper parties be cited to show cause why (1) such settlement should not be had; (2) the compensation of Messrs.

Rathbone, Perry, Kelley & Drye for legal services rendered in the preparation and settlement of the account should not be fixed and allowed in the sum of \$2,000 plus proper disbursements; (3) determination should not be had as to the disposition to be made of any dividend to be received by your petitioner in the stock of the Atlantic City Electric Company as a dividend on the stock of the American Gas & Electric Company; and for such other and further relief as the Court may deem just and proper and that an order be granted directing the publication of the citation as provided by law.

Dated: New York, March 27, 1947.

(Corporate Seal.)

Central Hanover Bank and Trust Company, by H. B. Pease, Ass't-Vice President, Petitioner.

Attest: D. N. Fisher, Assistant Secretary. (Notarial Seal.)

(Verified March 27, 1947.)

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[fol. 39] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

CITATION—March 28, 1947

The People of the State of New York

By the Grace of God Free and Independent

To All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the Following Described Trusts and Estates Participants Therein:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Ngamand Baldwin.



Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

[fol. 40] Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

[fol. 41] Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeois, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William L. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele

M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Penkoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

[fol. 43] Trust under Article I, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

[fol. 44] Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American Na-

tional Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

[fol. 45] Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the Codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence [fol. 46] (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee):

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2:

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

[fol. 47] Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.



Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGraffenried. [fol. 48] Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

[fol. 49] Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

[fol. 50] Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

SEND GREETING:

Upon the petition of Central Hanover Bank and Trust Company having its principal office at 70 Broadway, Borough of Manhattan, City, County and State of New York

You and each of you are hereby cited to show cause before the Surrogate's Court of the County of New York held at the Court House, Room 509, Hall of Records, 31 Chambers Street, Borough of Manhattan, New York City, on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why

(1) the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947 should not be judicially settled;

[fol. 51] (2) the compensation of Rathbone, Perry, Kelley & Drye for services rendered in the preparation and settlement of said account of proceedings should not be fixed and allowed in the sum of \$2,000 plus proper disbursements;

(3) determination should not be had as to the disposition to be made of any dividend to be received by the Central Hanover Bank and Trust Company, as such Trustee, in the stock of Atlantic City Electric Company as a dividend on the stock of the American Gas & Electric Company; and

(4) such other and further relief as the Court may deem just and proper, should not be granted.

In testimony whereof we have caused the seal of the Surrogate's Court of said County of New York to be hereunto affixed.

Witness, Hon. James A. Delehanty, Surrogate of our said County in the County of New York the 28th day of March in the year of our Lord one thousand nine hundred and forty-seven.

L. S. George Loesch, Clerk of the Surrogate's Court.  
(Seal.)

## [fol. 52] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

## PROOF OF PUBLISHING OF CITATION

STATE OF NEW YORK,

County of New York, ss.:

Arthur J. Cavanagh, being duly sworn, says that he is the Principal Clerk of the Publisher of The New York Law Journal, a Daily Newspaper printed and published in the County of New York; that the Advertisement hereto annexed has been regularly published in the said The New York Law Journal once in each of four successive weeks commencing on the 3rd day of April 1947 to wit: April 3rd, 10th, 17th and 24th, 1947.

Arthur J. Cavanagh.

(Sworn to April 24, 1947.)

## [fol. 53] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

## SUMMARY STATEMENT OF ACCOUNT OF PROCEEDINGS

The Following is a Summary Statement of Account

## Principal Account

## Charges:

Amount shown by Schedule A (Funds Received from Participants).....	\$2,926,328.07	
Amount shown by Schedule A-1 (Increases on Principal).....	109.18	
Total Principal charges.....		\$2,926,437.25

## Credits:

Amount shown by Schedule B (Decreases on Principal).....	\$ 466.05	
Amount shown by Schedule C (Principal Administration Expenses Paid).....	-0-	
Amount shown by Schedule D (Units Redeemed by Participants).....	52,418.81	52,884.86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947).....		\$2,873,552.39

## Income Account

## Charges:

Amount shown by Schedule H (Total Income Received).....	\$ 53,313.33	
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## Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants).....	\$ 58,103.72	
Amount shown by Schedule I-2 (Income Administration Expenses Paid).....	-0-	58,103.72
Amount shown by Schedule J (Income Cash Remaining on Hand January 30, 1947).....	O. D.	\$ 4,790.39

[fol. 54]

## Combined Accounts

Principal Remaining on Hand.....		\$2,873,552.39
Income Remaining on Hand.....	O. D.	4,790.39
Total on Hand, January 30, 1947.....		<u>\$2,868,762.00</u>

In addition to the schedules enumerated in the Summary Statement above, the following supplementary information schedules are annexed hereto:

- Schedule C-1 Statement of Unpaid Claims for Administration Expenses in Connection with the Accounting Proceeding.
- Schedule D-1 Distribution of Investments Held in Liquidating Accounts or Proceeds Thereof to Participants, Pursuant to Subdivision 7, Section 100(c) of the Banking Law.
- Schedule E Changes in Investment.
- Schedule E-1 Investments Set Apart in Liquidating Accounts Pursuant to Subdivision 7, Section 100(c) of the Banking Law.
- Schedule G Statement of Participants and Their Interest at Date of This Account.
- Schedule K-1 Statement of Investments Held as of the Opening of Business at Each Valuation Date.
- Schedule K-2 Statement of the Income Earned During Each Monthly Period.
- Schedule L Statement of All Other Matters Affecting the Administration of the Fund.

All of said schedules submitted herewith are part of this account.

CENTRAL HANOVER BANK AND  
TRUST COMPANY

By

H. B. PEASE  
Assistant Vice President

[fol. 55] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY  
PRELIMINARY REPORT AND ANSWER OF SPECIAL GUARDIAN AND  
ATTORNEY FOR INCOME, APPEARING SPECIALLY—May 26,  
1947

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee, and for each other party, known or unknown, who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially herein to contest the jurisdiction of this Court, do respectfully report and answer as follows:

## Objections

First: In view of the decision of Mr. Surrogate Witmer dated April 30, 1947 in the matter of the Security Trust



Company of Rochester Discretionary Security Trust Fund "A", I deem it my duty to raise herein the same objections which Surrogate Witmer sustained in the above mentioned case. Accordingly, I object as follows:

1. That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement [fol. 56] are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court.

2. That since the petitioner herein has commingled in the common trust fund moneys from *inter vivos* trusts with moneys from testamentary trusts, and since this Court has no jurisdiction over *inter vivos* trusts, it cannot render a valid decree herein.

#### Reservation of All Other Objections

Second: I specifically reserve my right to file objections to any and all matters other than those specified above.

Dated: New York, N. Y., May 26th, 1947.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney.

(Verified May 26, 1947.)

#### [fol. 57] IN THE SURROGATE'S COURT OF NEW YORK COUNTY PRELIMINARY REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR PRINCIPAL—June 2, 1947

By order dated March 31, 1947, I was appointed Special Guardian and attorney in this proceeding for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who does not otherwise appear in this proceeding who has, or may hereafter have, any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq., Special Guardian and attorney for various parties interested in income has served and filed

a preliminary report and answer objecting to the jurisdiction of this Court and alleging that (a) the provisions in Section 100-c of the Banking Law for notice of application for judicial settlement of this account are insufficient to meet the due process requirements of the Federal and State Constitutions; and (b) that since the Fund herein consists of property arising under Trust instruments *inter vivos* as well as property arising from Testamentary Trusts this Court lacks power to make a valid decree herein.

It is my opinion that neither of Mr. Mullane's objections is valid. I am of opinion that this Court has jurisdiction of the proceeding and has the power to make a valid decree [fol. 58] settling the account in conformity with the prayer in the petition made by Central Hanover Bank and Trust Company under date of March 27, 1947. Accordingly, I request that the objections of Mr. Mullane be dismissed as insufficient in law.

I respectfully request the right hereafter to report on the detail of the account and to make any and every objection thereto which in my judgment may seem necessary in order to safeguard the interests of the persons herein represented by me.

Dated: New York, June 2, 1947.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal.

(Verified June 2, 1947.)

[fol. 59] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION AS TO AGREED FACTS—August 21, 1947

It is hereby stipulated and agreed by and between the undersigned that the following shall be considered as proved facts:

1. That the average daily circulation of the New York Law Journal is Eight Thousand (8000) copies;

2. That the total population of New York City, according to the last Federal Census in 1940 was Seven million four

hundred and fifty-four thousand nine hundred and ninety-five (7,454,995).

Dated: New York, N. Y., August 21st, 1947.

Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner. James N. Vaughan, Special Guardian and Attorney for Principal. Kenneth J. Mullane, Special Guardian and Attorney for Income, Appearing Specially.

[fol. 60] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

### Transcript of Hearing

Hall of Records,

New York, N. Y.,

June 26, 1947;

10:30 A. M.

Before Hon. William T. Collins, Surrogate

#### APPEARANCES:

Rathbone, Perry, Kelley & Drye, Esqs. (Albert B. Maginnes, Esq., of Counsel), for Accountant, Central Hanover Bank & Trust Company.

James N. Vaughan, Esq., Special Guardian and attorney for principal.

Kenneth J. Mullane, Esq., Special Guardian and attorney for income.

The Surrogate: Go right ahead.

#### OPENING STATEMENT ON BEHALF OF ACCOUNTANT

Mr. Maginnes: Your Honor, this hearing was brought about by reason of the objections of Mr. Mullane, the Special Guardian for income, who felt it incumbent upon him to raise the question of the sufficiency of the service of process provided by Section 100-e of the Banking Law in this common trust fund accounting proceeding by reason of the opinion of the Surrogate of Monroe County, in which he held that the service was insufficient, and we want to offer some testimony as to the impracticability of operating the fund if personal service is required on all parties.

[fol. 61] CHARLES L. HERTERICH (residing at 189 Moore Avenue, Leonia, New Jersey), called as a witness on behalf of the accountant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maginnes:

Q. Mr. Herterich, by whom are you employed?

A. By the Central Hanover Bank & Trust Company.

Q. In what capacity?

A. I am the vice-president in the Personal Trust Department.

Q. And how many years have you been in the Personal Trust Department of that bank, and what have your duties been in connection therewith?

A. I have been with the Trust Department for the entire period of twenty-eight years and during that time I have had to do with the administration of estates and trusts.

Q. In connection with your duties have you supervised and been in charge of a large number of estates and trust accounting proceedings?

A. Yes, I have. I have supervised many hundreds of accountings in both the Surrogate's Court and the Supreme Court.

Q. Are you familiar generally with the provisions of the Surrogate's Court Act and the Civil Practice Act regarding necessary and proper parties to accounting proceedings in the Surrogate's Court and the Supreme Court?

A. I am.

Q. And are you familiar with the provisions of those two Acts requiring the service of process on all parties in both the Surrogate's Court and the Supreme Court?

A. I am.

Q. Are you familiar with the provisions for service of process of the court upon the persons interested in the participating trusts in a common trust fund set forth in Section 100-c of the Banking Law?

A. Yes.

[fol. 62] Q. From your experience, do you believe it would be practicable to operate a common trust fund if personal service of a citation had to be made on each person interested in each participating trust in the common fund in a proceeding for the settlement of the accounts of the trustee of the common fund?

Mr. Mullane: I object to that question, your Honor, on the ground it calls for the conclusion of a witness.

The Surrogate: It does call for a conclusion. I am taking the conclusion, and then let him say why, because it has to be a conclusion.

Mr. Mullane: Exception.

A. No, I do not.

Q. Why?

The Surrogate: You do not think it practicable?

The Witness: I do not think it practicable.

Q. Why?

A. Well, sir, there are, in my opinion, many reasons. First, the impossibility of locating all of the parties. It would require the most extensive search imaginable. There is involved the time element as well as the expense element, and very frequently there are many changes in the parties from the time of the issuance of the citations to the time of the entry of the decree, which necessitates supplemental citations. And, then, frequently we deal with situations where you have gifts to a class who cannot be determined without extensive search, questions relating to next of kin, [fol. 63] distributees. And then you have situations relating to minors, incompetents, frequently persons unknown. We don't and we can't maintain a continuous record of parties who might have or who might not have an interest in any given fund. If we had such a record at the inception of any trust there would just be no way of ever keeping it up to date, because we would never have any need for contacting these people.

Q. In other words, you would have to make practically a day-to-day check all during the proceeding; is that correct?

A. Yes, you would.

Q. Do you consider it important that the accounting of the trustee of the common trust fund be settled at frequent intervals?

A. Yes, I do.

Q. Why do you believe that?

A. Well, there are a number of reasons. I think, first, we have got to consider the broad purposes for which the common trust fund received legislative approval. This is a means of taking care of the smaller trust and giving it an opportunity to participate in a broader field of invest-



ments. It is extremely important, since you are primarily dealing with smaller funds, that the expense be kept to a minimum. Coming down to perhaps more practical considerations from the point of view of the trustee, it is rather important to have the fund or the record of the stewardship of the fund checked rather frequently. You want to have the investment policy checked as well as the individual securities bought or sold. It is rather important that the questions of valuations be determined at frequent intervals and I think of awfully great importance is the need to have the routine accounting matters cleared and passed on. I refer to things like dividend allocations and [fol. 64] those problems which are continually recurring.

Q. You have referred to the expense element. Do you believe that if the service on all parties with a vested or contingent interest in each participating trust, either personally or by publication, was required in the manner prescribed by the Surrogate's Court Act or the Civil Practice Act, that it would increase the expenses of the operation of the fund to a material degree, resulting in a charge to the participating funds?

A. Yes, I do.

Q. Why do you believe that, Mr. Herterich?

A. Well, because in so very, very many instances the search is really very extensive and we find in our experience that it is necessary to refer that sort of problem to the counsel who represents us in the individual fund. It takes them a great deal of time and the result is that you run up a rather large charge, sometimes very large in proportion to the size of the fund. And then it hasn't been uncommon for us to have had to actually hire private investigators.

I recall one instance where we were many, many years before we could find the people who were entitled to the fund and it resulted in great expense to hire these various investigators. And just recently I had a case where we knew all of the family, knew them very well, but it developed that there was a little friction between the persons in interest and they didn't contact each other. We heard sort of by the grapevine that a child had been born. That very simple fact, which seemed to me so, it took us four months to find—to verify from the mother of the child that she had a child. It took us about two months to get

[fol. 65] the mother to actually say, "I live here," to get an address to which notice could be given. There was a woman who was entitled to income from a trust. She didn't care about keeping in touch with us because she got her money, her income, by credit to a bank account, so she was quite happy. There is just a simple little illustration of the difficulty that can arise.

Q. And if that were multiplied a great many hundred times, as it would be if you had—

The Surrogate: It would be that many more times bad.

Cross-examination.

My Mr. Mullane:

Q. Mr. Herterich, you are familiar with the requirement of the Banking Law which requires the trustee of the common trust fund to send a notice to each person of sound mind and full age when an investment is made in a common trust participation from a trust in which he is interested?

A. Yes.

Q. What is the practice of the Central Hanover with respect to complying with that provision of law?

A. We send out a printed form of notice or a mimeographed form of notice which we think complies with the requirement and we keep a copy of it for our records.

Q. But how do you ascertain the names and addresses of the people to whom you send these notices?

A. Well, we ascertain the information by various methods. First, recourse to our own file, recourse to the attorneys' files, and by such outside investigation as is necessary.

Q. In other words, then, you keep a list of the names and addresses of the adult, competent persons who are interested in either principal or income of the common trust fund?

A. We do.

[fol. 66] Q. Do you know how many trusts are involved, participating trusts, in this common trust fund that is before the Court?

A. Subject to correction, I think at the present time there are 128 trusts, but I don't believe that that number were in at the time of the accounting. I think it was perhaps nearer 110 then.

Q. 110?

A. Approximately.

Q. In other words, there are 110 participating trusts named in the petition in this present accounting proceeding; is that correct?

A. Yes.

Q. Do you know the approximate number of adult competent persons who are interested in those 110 trusts?

A. I had the figure this morning but I have forgotten it. I just can't trust my recollection.

Q. Is there any way you can refresh your recollection from any record you have in the courtroom?

A. I could obtain it.

(Discussion off the record.)

The Witness: 315.

Q. Wouldn't it be practicable for a notice to be mailed to each one of these 315 people?

A. I will say that it would be practicable in the sense that it could be done. It perhaps would require setting up some additional machinery to follow the addresses.

Q. You have a list of the addresses at the time, at any rate, you put each participating trust in the common trust fund—

A. As of the time of the investment.

Q.—and then all that would be necessary would be a recheck of those addresses; isn't that correct?

[fol. 67] A. That all turns out in actual practice to be a terrific job—here today, gone tomorrow.

Q. Yes. I mean, after all, you can ascertain what the present addresses of each of these 315 people are by sending a postcard, can't you?

A. It is not quite that simple, Mr. Mullane, because—

Q. I am just talking about the 315 people.

A. So am I. What I am trying to say is that it is a terrific job even to keep in touch with those people who are perhaps even more directly interested, who are getting income from you. Now, you are going, in some cases here, a step perhaps just a little further removed, and you would be notifying people with whom you would have no other contact, and, believe it or not, they move an awful lot.

Q. All these participating trusts that you put into a common trust fund are trusts of which the Central Hanover

is at least one of the trustees or an executor; isn't that correct?

A. That is correct.

Q. And in the separate files of those various trusts you certainly have their names and addresses, do you not?

A. We had them as of the date we gave the notice.

Q. That's right. If the trusts, of course, are continuing trusts, you certainly have the names of the people in your respective individual files of those who receive income from you.

A. That, as a general thing, we have, except with some exceptions.

Q. You account individually in these trusts at regular intervals, do you not?

A. You mean income and principal statements?

Q. That's right.

A. We do.

[fol. 68] Q. And then you also have judicial accountings at regular intervals, do you not?

A. Well, further removed, we do.

Q. In order to have those individual judicial accountings, court accountings, it is necessary for you to ascertain the necessary and proper parties, is it not?

A. That's correct.

Q. So that, in addition to this list of 315 names that you keep for the common trust fund, you have a wealth of information in your individual files; isn't that correct?

A. We have a great deal of information.

Q. So that, really, it is a matter of bringing the information down to date in some instances, in many, perhaps?

A. Yes, that's true.

Q. And a simple notice sent by mail would cost three cents per letter; isn't that correct?

A. Assuming you were using the right address.

Mr. Mullane: That's correct.

That is all.

Re-direct examination.

By Mr. Maginnes:

Q. Mr. Herterich, in that number of 315 you didn't mean to convey the impression that those would be all the people

who would be interested in the funds, the individual funds, if they were to terminate?

A. No, I certainly didn't mean to convey that impression, because it would be a great, great many more.

Q. In other words, as I understand ~~it~~, that list of 315 income beneficiaries and adults who would take if the trusts were to end at this time is known to the bank; is that correct?

A. As per the requirement of the Banking Act, yes.

Mr. Maginnes: That is all.

[fol. 69] ALFRED T. ALLIN (residing at 287 Vincent Avenue, Lynbrook, N. Y.), called as a witness on behalf of the Special Guardian for principal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Vaughan:

Q. Mr. Allin, with whom are you associated?

A. Bank of New York.

Q. What is your capacity with that bank?

A. I am a trust officer.

Q. How long have you been with the Bank of New York as a trust officer?

A. As a trust officer—my title as trust officer took place in January of this year. I was assistant trust officer for ten years prior to that time and I have been with the bank for over twenty-five years.

Q. What is your present department, trust business exclusively?

A. I am engaged in the business of administering trusts in that Trust Department.

Q. And for how long have you been in that branch of the business?

A. About twenty-five years.

Q. Do you know whether Bank of New York has a common trust fund created under the provisions of Section 100-c of the Banking Law?

A. Yes, we have.



Q. Could you state what the approximate number of participating trusts, estates and funds in the common trust fund is at the present time?

Mr. Mullane: I object to that question, your Honor, as incompetent, irrelevant and immaterial. This is a proceeding relating to—

The Surrogate: No. I think it has something to do with [fol. 70] it. Because of the great number, he can speak more strongly on it. I am allowing it.

Mr. Mullane: Exception. May I have a general objection and exception to this whole line of testimony?

The Surrogate: Yes, sir.

A. 225.

Q. Do you know what the approximate value of the capital of that fund is today?

A. I don't know today. At the last valuation date, on April 30th, it was approximately \$6,250,000.

Q. Are you generally familiar with the provisions of the Surrogate's Court Act and the Civil Practice Act respecting the manner in which jurisdiction is obtained of parties interested on occasions when proceedings are brought to settle the accounts, say, of a testamentary trustee acting under a particular will or a trustee acting under a deed inter vivos?

A. Yes, I am.

Q. Are you familiar with the requirements of Section 100-c of the Banking Act with respect to the requirements for gaining jurisdiction in an accounting proceeding to settle the accounts of the trustee of the common trust fund?

A. Yes.

Q. Have you an opinion as to whether it would be workable in a proceeding to settle the accounts of the trustee of a common trust fund to require that kind of trustee to gain jurisdiction precisely as jurisdiction must be obtained by, say, a testamentary trustee seeking to settle his accounts in a particular trust?

Mr. Mullane: Your Honor, may I have a further objection that that calls for a conclusion?

[fol. 71] The Surrogate: Yes, it does; and I want the reasons why he reaches that conclusion.

Q. Have you an opinion, is my question.

A. It is my opinion it would not only be impracticable but practically impossible.

Q. State, please, for the Court the basis on which you have arrived at that opinion.

A. I have reviewed some of the trusts at random that we have admitted in the common fund, and a few examples I have here before me. If you wish, I will be glad to cite them.

Q. Please.

Mr. Mullane: Just so I will be clear, I understand I have a general objection to all of this testimony?

The Surrogate: I will give you an exception to all of this testimony.

Mr. Mullane: Thank you.

A. We have a trust with a life tenant; it runs for the life tenant's life, and upon that person's death the remainder is payable to five named beneficiaries, nieces, and if any of these nieces predeceases the life tenant it is payable to their issue, and if none of the nieces survive it is payable to their issue, and all these nieces are residents of various states, some in Pennsylvania, Massachusetts and New York. These remainders are remote. They don't keep in touch with us. We haven't their addresses on file. We know what their names are. We have many trusts which are confidential. Somebody makes a trust for a life tenant and they don't tell the remaindermen that they are [fol. 72] entitled to the principal, and it is only at such time as you decide that there must be some accounting that you hunt these people up and cite them and bring them in, in order to get complete judicial settlement of your trust. If we had to do it in this case it would mean writing to all these people and endeavoring to find out what their family tree is.

We have another case where upon the death of the life tenant before she becomes twenty-one the principal is payable to named remaindermen, and there are several of them. If they are dead it is to go to the children of the maker, and if the children of the maker are dead it is to be distributed in accordance with the intestate laws of the domicile of the maker, which is in Washington, D. C. In this case, if we were to have a judicial settlement, of that trust, we would have to consult Washington, D. C. attorneys in order to find out who would take and who the proper parties would be.

I don't want to unduly burden you with this, but there is another interesting case where we have a first life tenant. Then we have a second life tenant, and upon the death of the life tenants the principal is payable to the issue of a named person who isn't the life tenant or either of the life tenants. And if there is no issue, or they predecease the life tenants, it is payable to the heirs at law and next of kin of the testator. The testator having died many years ago, it is necessary to construct a family tree back and there is the question in this case as to whether it is payable to the next of kin at the time that person died or at the death of the life tenants. [fol. 73] And the testator died in Switzerland and most of her relatives were residents of Germany. Then it is necessary, if we were to have a judicial settlement here, to publish, and the expense of publishing would be very substantial.

Q. Let me ask you generally, in the 200 and more participants in your common trust fund is it the fact that there would be many analogous situations featured by analogous complications?

A. That is true. The usual run of trusts that we have provide that income be payable to a life tenant, and then, upon the death of the life tenant it is payable to the issue, and there is a further contingency usually that if she dies without leaving issue it is payable to the distributees of the testator or the maker of the trust or some simple arrangement like that, and even with that simple arrangement it means keeping voluminous records, which you don't do. There is no way that you can keep up to date on it because the family is scattered and they go all over the world, and the result is that the correspondence and work involved would be prohibitive.

What you can do with one single trust is one thing. If you have to hire detectives and other sources like that to find out who the people are, you can do it with one, but when you get 225, and as this trust grows with substantial additional trusts coming in, it can't be done with 225.

Q. On the last point you mentioned, Mr. Allin, do you regard 225 participants as a ceiling on the reasonably desirable number of participants in a common trust fund?

A. Not at all.

Q. Do you regard \$6,000,000. as in some fashion in the nature of a ceiling on what would be a manageable quantum

[fol. 74] of property to have in a single common trust fund?

A. No, I don't.

Q. Without asking you to express an opinion on a maximum or optimum, shall I say, number of participants, the optimum quantum of total property, would you say that it is the considered view of yourself and your bank that a substantially larger number of participants would be workable?

A. Not only workable—we intend to increase this fund as funds become available for investment, and we have placed no ceiling on the number of trusts that may be admitted or the amount of money to be combined into one fund.

Cross-examination.

By Mr. Mullane:

Q. Mr. Allin, you are familiar with the requirements of the Banking Law as to giving notice to every person of full age and sound mind interested in either the principal or the income of a participating trust when it is put into a common trust fund?

A. I am.

Q. What is the practice of the Bank of New York in complying with that requirement?

A. We search our records diligently and determine what persons are interested in the trust and where they are ascertainable, and where we have the addresses we send them the statutory notice.

Q. If you don't have an address, do you make any effort to ascertain one?

A. No, sir. That is the point; that is impracticable and impossible. If I was to—

Q. In every one of these participating trusts that is put into your common trust fund, the Bank of New York is at least one of the trustees or one of the fiduciaries; isn't that [fol. 75] correct?

A. That is correct.

Q. Of course, in your individual files for these individual trusts you have the records of the parties interested, at least the parties interested in income?

A. We have the parties interested in income, because we are distributing income to them. We make no attempt to compile records of the remainder interests because of the contingent interests that most of them have.

Q. Under the Banking Law, you are familiar with the fact that no more than fifteen months can elapse since the creation of a common trust fund before an account must be filed?

A. That's correct.

Q. And you are also familiar with the requirement of the Banking Law that an account must be rendered every three years thereafter?

A. Yes.

Q. So that as to the common trust fund accounting you are dealing with a period of no more than three years; isn't that correct?

A. Yes.

Q. During that period of three years you may or may not have accountings in the individual trust funds, I mean, court accountings; isn't that correct?

A. Yes.

Q. And you would have data there as to all the parties interested in those participating trusts, would you not?

A. No. That is the point. We don't have that data. We have never had a policy of accounting in our individual trusts regularly, and for a substantial extent, most—very few of our accounts have been judicially settled within the [fol. 76] last ten or fifteen years, and the result is that we have a lack of information.

Q. If it did happen that you had a judicial accounting in one of the participating trusts, you should have the information as to the necessary, proper parties.

A. If we had had a judicial settlement at the time—of the judicial settlement—I would have the information of the addresses and the parties in the trust at that time.

Q. And at least you have the information as to the income beneficiaries currently?

A. That's right.

Q. That is kept right up to date, of course, is it not?

A. Yes.

Q. Can you tell me the approximate number of adult, competent people who are interested in the various trusts which are participating trusts in your common trust fund?

A. You mean having a present interest?

Q. That's right.

A. Just a present interest?

Q. That's right.



A. I am afraid I can't tell you that. I am not prepared to answer that question. I haven't compiled it.

Q. Can you give any approximation of it?

A. I can give you an opinion as to the number of persons that I think would be cited on a judicial settlement, and I can give it to you in thousands, but I couldn't estimate any closer than that.

Q. How many thousand?

A. I would say in taking, for example, this trust, which is a normal one, where the life tenant gets the income, that is one, and then we have five named nieces.

Q. Are they adult and competent?

A. They are all competent people. They are entitled to the principal if the trust should end now. And then, if they [fol. 77] die before the life tenant and they leave issue, the issue takes. I don't know how many issue they have. I know that they have issue, but it multiplies and it will as the years go on.

Q. I haven't made myself clear. I mean, can you give me some approximation of the number of people interested in the common trust fund principal, under the same rule as you would be required to give notice under the Banking Law; in other words, adult, competent persons presently interested in income or who would presently take the principal if the trusts were to terminate.

A. I couldn't give you an idea such as that. I suppose that it would run well over one thousand.

Q. Would it exceed 2,000, do you think?

A. I don't know. It would be closer to 2,000, I would say, than 1,000.

Q. Would it exceed 5,000?

A. I don't think so.

Q. So that—

A. Of course, some of this would depend upon a construction of the instrument to find out who the parties were.

Q. You have that problem any time you have to put the trust into the common trust fund, don't you?

A. That's right.

Q. So, at least as to the trusts that are in there, you have solved the problem as of the date the participating trust was put into the common trust fund, haven't you?

A. No, I wouldn't say so. We may have instruments in there or trusts in there where the remaindermen are unas-

certainable. It would depend upon a construction of the instrument to determine who they were.

[fol. 78] Q. Don't you comply with subdivision 9 of 100-c of the Banking Law?

A. Yes, sir, but when you have a per capita or stirpital distribution, we would have to consult counsel as to who the parties were.

Q. Suppose you had that situation and you wanted to put a participation into a common trust fund, just what would you do? That is what I want to find out.

A. We would send the notice to the adult persons of the class, if we knew who they were.

Q. As to this question of the ceiling on the number of trusts in a common trust fund, you realize that under the Banking Law you are not limited to one common trust fund, don't you?

A. Yes.

Q. You can set up as many as you wish; isn't that so? And undoubtedly, perhaps after some years of experience, you may find an optimum number; isn't that your opinion?

A. The future will tell.

Mr. Mullane: That's right.

All right. That is all.

The Surrogate: All right, sir.

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GEORGE C. BARCLAY (residing at 126 East 95th Street, New York, N. Y.), called as a witness on behalf of the accountant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maginnes:

Q. Mr. Barclay, by whom are you employed?

A. City Bank Farmers Trust Company.

Q. And in what capacity?

A. Vice-president.

[fol. 79] Q. How long have you been with the City Bank Farmers Trust Company?

A. Seventeen years.

Q. What is the nature of your duties there?

A. I am in charge of the Personal Trust Administration Department.

Q. And in that connection are you familiar with the operation of estates and trusts in the common trust funds?

A. Yes, that is my job.

Q. Do you maintain a common trust for City Bank?

A. We don't maintain a fund of the type permitted by Section 100-c of the Banking Law. We do maintain funds that were started back in 1929 and 1930, which are extremely similar but which, for various reasons, we have not been able to conform to all of the requirements of Section 100-c.

Q. What other experience, or what experience have you had in connection with common trust funds?

A. Well, in the first place, I was appointed an officer of the Trust Company in 1930 in order to manage and operate the so-called common trust funds that they had then. Then I was associated with the Common Trust Fund Committee of the Trust Division of the American Bankers Association from the days when that Committee was conferring with the Board of Governors of the Federal Reserve System for the formulation of Section 17, Regulation F, and ultimately I became chairman of that Committee and was the chairman at the time that the regulation was further amended in July of 1945.

I also had assisted in the drafting of the first version of Section 100-c and assisted in the drafting of the regulations of the Banking Board, and was the chairman of the committee of the New York State Bankers Association charged with the drafting of Section 100-c which resulted in the amendments in 1943.

Q. Mr. Barclay, are you familiar generally with the Surrogate's Court Act and the Civil Practice Act with respect to necessary and proper parties to a proceeding and to the method or the manner of the service of process in those two courts upon the persons interested in trust accounting?

A. Yes, I am.

Q. Are you familiar with the provisions of Section 100-c of the Banking Law with respect to notice?

A. I am.

Q. In your opinion, would it be practicable to operate a common trust fund if it were necessary to bring all the parties in or to require jurisdiction of all the parties who would be interested in each participating fund in the com-

mon fund in the manner prescribed by the Surrogate's Court Act?

Mr. Mullane: I object.

The Surrogate: I will give you an exception to this line of testimony.

Mr. Mullane: May I have a further exception, your Honor, that he is not qualified as an expert?

The Surrogate: I am taking his testimony. It is the weight of his testimony, as to his qualifications.

Mr. Mullane: I have a general exception?

The Surrogate: Yes.

Mr. Mullane: Thank you.

A. No, I do not think it would be practicable.

Q. Why do you have that opinion?

A. Well, an accounting of this kind that you have here is [fol. 81] an intermediate accounting in effect, and, therefore, you have or would have, under the Surrogate's Court Act procedure, to cite all the parties. The usual form of trust today, as Mr. Allin described, is a trust for a life beneficiary, remainder to issue. Up to that point you may have one issue or any quantity, and then generally a further remainder over to heirs at law, distributees, as of what time it would depend, so that the normal trust today doesn't have vested remainders, it has contingent remainders, and, therefore, the parties are terribly numerous. I don't think that it is at all possible, purely as a physical proposition, to cite or notify all the persons who would be interested in all the trusts in a common trust fund during the three months' period allowed by the statute or any other reasonable period that might be suggested.

Q. Do you consider it important that there be frequent accountings of a common fund?

A. I wouldn't want to operate a common fund without frequent accountings.

Q. Why is that?

A. Well, in the first place, if you didn't have an accounting in the common trust fund, then, whenever there was an accounting in a separate trust, and let us say there had been decrease in value in that trust's participation in the common trust fund, a careful attorney or guardian might very well require, if not a complete accounting of the common trust fund, certainly the exhibition of all the records and transactions of it over a period of, goodness knows how

many years. If there had been formal accounting of the common trust fund, in each such case the expense to the participating trust would be terrific. If there had to be an informal investigation, the time spent by the guardian, [fol. 82] the attorney for the party, would also have to be compensated for, and that would be a very great amount of money.

Then, people are fallible and, no matter how careful one is, one may make a mistake in a valuation or some other computation with respect to the fund. It would be a terrible thing to have that come back and plague you many years later.

And, finally, the investment policy of these discretionary funds—this is particularly true, of course, in a discretionary fund—ought to be approved from time to time, or, to put it in reverse, the trustee ought to have an opportunity to have its policy criticized from time to time and, as I said before, we wouldn't have a common trust if we couldn't account.

Q. In your experience, would you say that the number of participating trusts in the Bank of New York discretionary fund that Mr. Allin testified to and the number now in the Central Hanover account before the Court is a small number of participating trusts or a large number?

A. Well, I have had, as part of my committee job, to keep in touch with developments all around the countryside in regard to common trust funds, and I do know, to use just one example, that the Pennsylvania Company in Philadelphia has two funds. The discretionary fund has 1607 trusts and is worth \$32,000,000., and the legal fund has 1318 trusts and is worth \$11,000,000. That is as of yesterday.

Q. You regard those as a normal-sized fund?

A. Well, I think they are getting fairly large at that point. Not many banks have that many trusts to put in a common [fol. 83] trust fund, but a big New York City bank could put in presumably more than that.

Mr. Maginnes: That is all.



### Cross-examination.

By Mr. Mullane:

Q. You are familiar with the Banking Law provision, Section 100-c, that the bank or trust company is not limited to creating one discretionary common trust fund?

A. Yes.

Q. You are also familiar with subdivision 9 of Section 100-c of the Banking Law with respect to notice to be given to every adult party, every adult, competent party?

A. I am.

Q. Is it your opinion that under that subdivision of the statute the common trustee must send a notice to every adult, competent person who has a present interest in income or principal?

A. Yes, if the address is known to the trust company, but I don't think there is any duty to find the address required by the statute.

Q. In your opinion, would it be feasible to send a notice, a simple notice by mail, to every adult, competent person whose address was known to the trust company at the time of the judicial settlement of a common trust fund?

A. If you limited it to those persons whose addresses were known, or where there was a last address, then, subject to a couple of exceptions, it would be a matter of mechanics to do it, but, of course, there are things that happen. For instance, an incompetent might become competent again. An infant becomes an adult. All things like that, you don't know; there is no way you can find out.

Q. Don't you have the same problem if, for instance, the [fol. 84] common trustee had the address of a incompetent who became competent; wouldn't that same problem arise under subdivision 9 of Section 100-c of the Banking Law?

A. No, because there you have what you might call a retail job. Each time you put in a participating trust you find out from what sources you can. I don't think anybody is undiligent about it; but to find out as reasonably as you can who the parties are, that is the end of your obligation. You have done it for that trust, then, and then you do it for another trust later, but you don't have to do it for 225 trusts all in three months.

Q. But assume that you wanted to put a participation from Trust A into the common trust fund, you would have

to ascertain who were presently interested in principal and who were interested in income; isn't that correct?

A. I think, as I understand the statement in the subdivision of the statute, you don't have to do anything except to see what you have on your books, and you may or may not know something about the remaindermen. You probably will know something about some of them but not about all of them.

Q. You at least must make an effort to find out whether you know their addresses, don't you, under the statute?

A. Oh, I think you have got to find out whether you know their addresses, yes.

Q. And in order to find that out you would have to find out who the parties are, wouldn't you?

A. You can't do that if there is an unnamed class. The way it would work out, Mr. Mullane, as a practical matter, with us is that in a trust that we take in now we have a sheet in our docket and we try very hard at that time to get the names of everybody and put them down there, and [fol. 85] then they get transferred to the address files. That is good for that moment when the new trust comes in, but what is going to happen in the way of changes in the course of time no one knows and you can't keep up with that.

Q. What I mean is this: Suppose you want to put a participating trust A into the common trust fund. Now, the statute says that you must send a notice of such investment to every adult competent person whose address is known to you.

A. Right.

Q. Who has an interest in income or who would be interested in principal if the trust were to terminate. In order to comply with that, you must at least see who is interested in the income and who is presently interested in principal, and then see if you have the addresses.

A. Exactly. We go to this very docket I mention, and if it is a new trust we will have the names, and then we go to our address file and we get the addresses, and that is the information we have about that trust. Of course, if it is an old trust then, and we haven't got any information in our docket, we are pretty well stymied.

Q. You are also familiar with the Banking Law that the first account must be made within fifteen months of the creation of the fund?

A. Oh, yes.

Q. And every subsequent accounting within three years thereafter?

A. Yes.

Q. So that you are limited at the greatest to a three-year period. Then don't you think it is feasible to send a simple notice by mail at the time of an intermediate accounting of the common trust fund to every adult person who is competent, whose address you have?

A. Well, assuming that you had 1600 trusts and assuming [fol. 86] an average of four parties to a trust, there is 6400 notices you would have to send out, which I think is quite a physical burden and I don't think you gain anything by it, in view of the fact that you are only sending it to the people whose addresses you have, without any diligence on your part to find out any other addresses.

Q. It could be done, could it not?

A. Well, it doesn't bear any analogy to what I understand is the law in regard to serving process.

Q. That is not the question I asked you. I asked you if a simple notice could be sent by mail. It is feasible; it can be done, can it not?

A. Mechanically it can be done, yes.

Mr. Mullane: That is all.

Cross-examination.

By Mr. Vaughan:

Q. You testified, Mr. Barclay, that you participated in the work which resulted in the draft of an amendment to 100-c of the Banking Law, which amendment authorized the creation of discretionary common trust funds?

A. That's right. There were about eight amendments.

Q. May I ask whether you were also a participant in the drafting of the original Act?

A. My late colleague, Mr. John T. Creighton, was the chairman of the Committee then.

Q. Did you cooperate with him?

A. I cooperated with him. I sat at the next desk and we worked together all through that winter when it was being drafted.

Q. Will you tell the Court, if you know, whether substantial consideration was given to the problem of reconciling the requirement of giving reasonable notice to parties who

would be affected by an accounting proceeding to settle the accounts in a common trust fund on the one hand and the [fol. 87] practical consequences of thousands of persons being interested in the results of the operation of that trust on the other.

Mr. Mullane: I object to that question.

The Surrogate: Will you hold that for a minute? We will take a ten-minute recess.

(After short recess.)

The Surrogate: He was just asked: Was that given consideration? It calls for a "Yes" or "No".

A. Yes a great deal of consideration.

Q. Would you state that all those who were participating in the drafting of this legislation specifically adverted to that question?

A. No question about it.

Q. Was there unanimity in opinion that the form of notice eventually embodied in subdivision 9 of Section 100-c met all the constitutional requirements?

A. Yes. That was the opinion, and the form of the provision was directed toward the very constitutional point you mentioned.

Q. I would like the record to be perfectly clear on this point—perhaps it is—but, Mr. Barclay, if it is not, could you answer this question: Certain notice is required by the Banking Law to be given to adult and competent persons at the time when a particular participating trust is placed in the common trust fund. You remember that?

A. That's right.

Q. Are the persons to whom such notice is to be addressed all of the persons interested in the participating fund?

A. Oh, no, very far from it. Ordinarily a small minority.

Q. Do you understand that the laws that now exist impose [fol. 88] upon the common trust fund trustee any special burden to investigate into the identity of those adult and competent persons?

A. No, I think it merely means that you take the names that you have and the addresses that you have, and that you do not have to make any further investigation.

The Surrogate: Let me put that question my way: At the time of making the first investment of any estate in the com-

mon trust fund, are you required to send notice to every adult, competent person or only to those whose names and addresses are known to the trustee and who is then known by it to be interested?

The Witness: The latter, your Honor.

Q. Would the changes of parties attributable to the birth of new parties or to the deaths occurring between the time of filing an account and the return day of the citation constitute a formidable problem if the common trustee, the common trust fund trustee, were required to get jurisdiction of all parties in the manner which is usual under the Surrogate's Court Act on the settlement of an account of a testamentary trustee in regard to a particular trust?

A. I think it would be insurmountable, because you would have to get out supplemental citations for newly-born infants, you would have to await the appointment of executors, you might have to await a probate contest or something of that kind, and I just think it isn't possible.

Q. Is it a fact, from your experience, that these changes in existence, you might say, arising out of new births and of deaths actually impose in many individual trust accountings [fol. 89] substantial delays in getting from the date of filing the petition to the final decree which settles the account?

A. Yes, we have them all the time, that kind of delay.

Q. When you say "delay," is the delay substantial? Is it measurable by months in some instances?

A. It is definitely measurable by months. We have had one case where two remaindermen with vested remainders died during the period of the preparation of the account and after the filing of it, and we have had to have two executors appointed for these people, and I think the total delay has run up to nine or ten months.

Q. Would you say that it is your opinion, based on your experience as testified to, that if you had to gain jurisdiction in the usual manner in instances where there are over 200 trusts affected, that it would be a literal impossibility to get from filing of the petition to the ultimate decree?

A. You couldn't possibly do it. Your first information would be stale by the time you got your last information.

Mr. Mullane: No questions.

The Surrogate: All right.

(Discussion off the record.)



The Surrogate: Exchange briefs by August 1st. Reply by August 15th.

[fol. 90] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY  
REGULATIONS RELATING TO THE ESTABLISHMENT AND OPERATION OF COMMON TRUST FUNDS PURSUANT TO SECTION 100-C OF THE BANKING LAW OF THE STATE OF NEW YORK

ARTICLE I

Conditions Precedent to Establishment of Common Trust Fund

1. *Approval of Banking Board Required.*

No trust company shall establish a common trust fund pursuant to the provisions of Section one hundred-c of the Banking Law until it shall have submitted a plan of operation thereof to the Banking Board and shall have received the written permission of the Banking Board to do so.

2. *Resolution of Board of Directors.*

The board of directors shall formally authorize by resolution the establishment of each common trust fund to be operated by the trust company. The minutes of such trust company shall show:

- a. The date of issuance of permission of the Banking Board for the establishment of the fund.
- b. The identifying title of the particular fund.
- c. The plan of operation of the fund.

3. *Plan of Operation.*

Before the operation of a common trust fund is begun a copy of the plan of operation approved by the board of [fol. 91] directors shall be placed on file at the principal office of the trust company. A copy of such plan thereafter shall be kept on file at such office until the fund has been completely liquidated, and shall be available for inspection during all banking hours by any person having an interest in an estate, trust or fund whose funds are invested in the common trust fund. A copy of such plan shall be given on

reasonable request to each person interested in any estate, trust or fund participating in such common trust fund. Such plan shall contain full and detailed provisions regulating the manner in which the common trust fund is to be conducted, including the following provisions:

a. The investment powers of the trust company with respect to the common trust fund which shall include specifically a statement as to whether such common trust fund is to be a legal or a discretionary common trust fund.

b. The computation and allocation of income, and the distribution thereof.

c. The allocation of the profits and losses of the fund.

d. The terms and conditions governing admissions to and withdrawals from the fund.

e. The original unit of participation, which shall be one dollar, ten dollars or one hundred dollars.

f. The form of documentation, if any, to be issued as evidence of participation.

[fol. 92] g. The auditing and settlement of accounts of the trust company with respect to the fund.

h. The basis and method of valuing assets therein.

i. The basis upon which the fund may be terminated.

j. The method by which the plan may be amended.

k. Such other matters as may be necessary to define clearly the rights of participants therein.

Such plan shall contain a specific provision that the plan shall be subject to the thereafter currently effective provisions of the Banking Law and the currently effective rules and regulations of the Banking Board pertaining to the operation of common trust funds.

## ARTICLE II

## Duties of Trust Investment Committee and Administrative Officer or Officers

1. *Trust Investment Committee.*

The board of directors by resolution shall appoint a trust investment committee, which shall be composed of at least three members; who shall be capable and experienced officers or directors of the trust company. Alternates for regular members of the committee, by like action of the board, may be appointed to serve when such regular members are unable [fol. 93] to attend. The trust investment committee shall be charged with responsibility for the management and conduct of each common trust fund. It shall keep full and complete minutes of all decisions and activities relating thereto, including:

a. The approval in each instance of admission to participation, with notations as to eligibility thereof for the funds of the participating estate, trust or fund.

b. The withdrawal of any participation in whole or in part.

c. The approval of every purchase and sale of an investment for the common trust fund.

d. The designation of valuation dates other than those specified by law.

e. The determination, on each valuation date, of the eligibility of each investment of the common trust fund.

f. Every review of the fund and its investments, with notations of decisions regarding assets to be sold, held, exchanged or otherwise dealt with.

g. The determination to transfer any investment to a liquidating account.

2. *Administrative Officer or Officers.*

The trust company shall appoint by resolution of the board of directors a qualified and competent officer or officers to administer each common trust fund. Such adminis-

trative officer or officers shall direct the activities of the [fol. 94] fund under the supervision and guidance of the trust investment committee and shall be responsible for the execution of the orders and directions of the trust investment committee and for the maintenance of proper accounting records relating to the fund.

### ARTICLE III

#### Number of Common Trust Funds; Limitations Respecting Participations

##### *1. Number of Common Trust Funds.*

A trust company may establish more than one common trust fund but must obtain express permission in writing from the Banking Board for the establishment of each such fund.

##### *2. Limitations Respecting Participations.*

No funds of any estate, trust or fund shall be invested in a participation in a common trust fund if such investment would result in such estate, trust or fund having invested in the aggregate in the common-trust fund an amount in excess of 10 per cent of the value of the assets of the common trust fund, as determined by the trust investment committee, or the sum of \$50,000, whichever is less at the time of investment. If the trust company administers more than one common trust fund under this article, no investment shall be made which would cause any one estate, trust or fund to have invested in the aggregate in all such common trust funds an amount in excess of the sum of \$50,000. In applying the limitations contained in this paragraph, [fol. 95] if two or more trusts are created by the same settlor or settlors and as much as one-half of the income or principal or both of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one. In determining whether the value of the interest of an estate, trust or fund is more than 10 per cent of the value of the assets of the common trust fund the computation shall be made with respect to the common trust fund as increased by the amount of the proposed investment.

## ARTICLE IV

## Accounting Records; Participation Register; Documentation

1. *Accounting Records.*

A separate complete set of accounting records shall be maintained for each common trust fund. Such records shall clearly distinguish items of principal from items of income of such fund.

2. *Participation Register.*

A register shall be maintained for each common trust fund, showing with respect to each participating estate, trust or fund:

a. The date of each admission to participation, the number of units allotted and the amount paid therefor.

b. The date of each withdrawal, the number of units [fol. 96] redeemed, the amount paid on redemption to the participating estate, trust or fund and whether payment was made in cash, in kind or partly in cash and partly in kind.

c. The number of units currently held.

d. The share in any liquidating account.

3. *Documentation.*

At the option of the trust company participations in a common trust fund may be evidenced by certificates, but no trust company administering a common trust fund shall issue any document evidencing a direct or indirect interest therein in any form which purports to be negotiable or assignable.

## ARTICLE V

## Valuation of Common Trust Fund Investments

1. *Time of Valuation.*

Investments shall be valued by the trust investment committee on or as of the opening of business on the days required by law and such other date or dates as the plan



of operation of a common trust fund may provide or as the trust investment committee or a court of competent jurisdiction may direct pursuant to the Banking Law.

## *2. Method of Valuation.*

The following method shall be used in the valuation of investments:

a. Where there have been recorded sales or bid and [fol. 97] asked prices of an investment of the common trust fund on a security exchange or exchanges in the city of New York, within ten business days next preceding the valuation date, the trust investment committee shall use for the valuation of such investment the last recorded sale price, if there have been such recorded sales, unless on a day subsequent to such sale and within such ten business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this paragraph recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the city of New York, in standard financial periodicals, or on the records of a security exchange in the city of New York.

b. In the case of all other investments, except investments in mortgages, the trust investment committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the trust investment committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last business day prior to the valuation date. The [fol. 98] average of such estimates shall be used, and each such estimate shall be retained in the records of the common trust fund.

c. In the case of investments in mortgages, the trust investment committee shall secure, prior to any valuation date, from not less than two persons qualified in the opinion of the trust investment committee to give

an opinion as to the value of the mortgage in question a written estimate of the value of such mortgage. At least one of the persons making such valuation shall not have participated in the making of the last preceding valuation. The average of such estimates shall be used and each such estimate shall be retained in the records of the common trust fund. Notwithstanding the foregoing, in the event that the trust company shall have in its files such a written estimate of value made within one year of the valuation date, such estimate may be used. The real estate securing each such mortgage investment shall be appraised at least once every three years by two persons, one of whom shall not have participated in the last preceding appraisal of such real estate. Such persons shall be appointed by the trust investment committee and shall, in the opinion of such committee, be familiar with real estate values in the vicinity in which such real estate is situated and qualified to make such appraisals. The persons so appointed shall actually inspect such real estate and shall so certify in a written certificate of appraisal, which shall be filed and preserved in the records of the common trust fund. In preparing a written estimate of the value of any mortgage, due consideration shall be given, by the persons making such valuation, to the last written certificate of appraisal of the property covered by such mortgage.

d. In the case of a stock where a dividend has been declared but has not been paid and the amount of such dividend has been considered as income under the provisions of the plan of operation of the common trust fund, the amount of such dividend shall be deducted from the price of the stock in determining its value unless such price shall be an ex-dividend price.

e. An investment purchased and awaiting payment against delivery shall be included for valuation purposes as a security held, and the cash account shall be adjusted to reflect the purchase price including brokers' commissions and other expenses incurred in the purchase thereof but not disbursed as of the valuation date.

f. An investment sold but not delivered pending receipt of proceeds shall be valued at the net sales price.

[fol. 100] g. For the purpose of valuation of an investment, except an investment sold but not delivered, it shall not be necessary to deduct from the value ascertained as above indicated brokers' commissions or other expenses which would be incurred upon a sale thereof.

### 3. *Valuation Schedule.*

Within ten business days after any valuation date, the trust investment committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- b. Its face value.
- c. Its value as carried on the books of the common trust fund.
- d. Its value as determined upon such valuation date.

Each such schedule shall be certified by one or more of the members of the trust investment committee and filed as a permanent record of the common trust fund.

## ARTICLE VI

### Admissions and Withdrawals; Distribution of Income; Periodic Statement

#### 1. *Basis and Time of Admissions and Withdrawals.*

For the purpose of admissions to and withdrawals from [fol. 101] the common trust fund, the principal of the fund shall be determined by adding to the value of the investments, as determined in accordance with the provisions of Article V, the uninvested cash principal and other items of principal, and by deducting from the total there any liabilities, due or accrued, chargeable to principal. For the purpose of computing the value per unit, the principal thus determined shall be divided by the number of existing units and such unit value together with a sum equal to the proportionate share of any income held or ac-

crued and remaining undistributed at the valuation date shall be the basis for admissions to and withdrawals from the common trust fund. In determining the value of a unit, fractions less than one one-hundredth per cent of the original unit value may be omitted. No participation shall be admitted to or withdrawn from a common trust fund except on the basis of such valuation and as of such a valuation date. A reasonable period, not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participations therein. No participation shall be admitted to or withdrawn from a common trust fund unless a written request for or notice of intention of taking such action shall have been entered in the records of the trust company and approved by the trust investment committee, at least five days prior to the valuation date. No such request or notice may be cancelled or countermanded unless such action is taken at least five days prior to the valuation date.

Any trust company administering a common trust fund [fol. 102] shall have the responsibility of maintaining in cash and readily marketable securities such part of the assets of the common trust fund as shall be deemed by the trust company to be necessary to provide adequately for the needs of participating estates, trusts or funds and to prevent inequities between such estates, trusts or funds. In any event, prior to any admissions to or withdrawals from a common trust fund, the trust investment committee shall determine what percentage of the value of the assets of a common trust fund is composed of cash and readily marketable securities; and if such committee determines that, after effecting the admissions and withdrawals which are to be made pursuant to notice given as required in paragraph 6 of Section 100-c of the Banking Law less than 40 per cent of the value of the remaining assets of the common trust fund would be composed of cash and readily marketable securities, no admissions to or withdrawals from the common trust fund shall be permitted as of the valuation date upon which such determination is made, except that ratable distribution upon all participations is not prohibited.

When participations are withdrawn from a common trust fund distributions may be made in cash or ratably in kind, or partly in cash and partly ratably in kind, provided that

all distributions as of any one valuation date shall be made on the same basis. Before any distribution in cash is made, the trust investment committee shall determine whether any investment remaining in the common trust fund would be [fol. 103] unlawful for one or more participating estates, trusts or funds, if funds of such estates, trusts or funds were being invested at that time; and no distribution shall be made in cash until any such investment shall have been eliminated from the common trust fund either through sale, distribution in kind, or segregation as provided in Article VIII of these regulations.

## *2. Distribution of Income.*

The income of a common trust fund shall be computed on the accrual basis and the apportionment of income shall be determined at each valuation date. The income shall be distributed to participating estates, trusts or funds not less frequently than quarter-annually, either on the basis of income accrued or on the basis of income actually received. To facilitate the distribution of accrued but uncollected income, the cash principal of the common trust fund may be used, to the extent necessary, to purchase income accrued.

## *3. Periodic Statement.*

Within ten business days after any valuation date, the trust investment committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the common trust fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- [fol. 104] b. The value per unit.
- c. The income per unit since the preceding valuation date.

Such periodic statements of condition shall be certified by one or more of the members of the trust investment committee and retained as permanent records of the common trust fund.



## ARTICLE VII

## Investments

*1. Limitations.*

No investment for a common trust fund shall be made in stocks or bonds or other obligations of any one person, firm or corporation which would cause the total amount of investment in stocks, or bonds or other obligations issued or guaranteed by such person, firm, or corporation to exceed 10 per cent of the value of the common trust fund as determined by the trust investment committee, provided that this limitation shall not apply to investments in obligations of the United States or for the payment of the principal and interest of which the faith and credit of the United States shall be pledged. If the trust company administers more than one common trust fund no investment shall be made which would cause the aggregate investment for all such common trust funds in such stocks, bonds or obligations to exceed such limitation.

No investment for a common trust fund shall be made in [fol. 105] any one class of shares of stock of any one corporation which would cause the total number of such shares held by the common trust fund to exceed 5 per cent of the number of such shares outstanding. If the trust company administers more than one common trust fund no investment shall be made which would cause the aggregate investment for all such common trust funds in any one class of shares of stock of any one corporation to exceed such limitation.

*2. Segregation*

The investments of each common trust fund shall be kept separate from all other property belonging to or in the custody of the trust company.

Such investments shall be subject to the joint control of two or more duly authorized officers or employees of the trust company.

*3. Mortgage Investment Funds*

No common trust fund shall be invested solely or principally in mortgages unless and until regulations are issued by the New York State Banking Board authorizing Mort-

gage Investment Funds and providing for the establishment and operation thereof.

## ARTICLE VIII

### Liquidating Accounts

#### *1. Transfer of Investment to Liquidating Account.*

The trust investment committee shall cause to be transferred [fol. 106] to a liquidating account each investment held by a common trust fund which has ceased to be eligible as a new investment for such common trust fund. The trust investment committee in its discretion may cause to be so transferred any other investment which the trust investment committee deems advisable to distribute in kind or to liquidate for the benefit of the participants entitled thereto.

#### *2. Schedule of Interests in Liquidating Account.*

At the time of the creation of each liquidating account the trust investment committee shall cause to be prepared a schedule showing the interest of each participating estate, trust or fund therein. When the assets of such liquidating account shall have been completely distributed such schedule shall be thereafter held as part of the permanent records of the common trust fund.

#### *3. Effect of Transfer of Investment to Liquidating Account; Procedure on Accountings with Reference to Liquidating Accounts.*

For the purpose of subsequent admissions to and withdrawals from the common trust fund, the value of any investment transferred to a liquidating account shall be excluded. The trust company shall include in any subsequent accounting for the common trust fund an accounting for each liquidating account established in connection with such common trust fund.

[fol. 107]

## ARTICLE IX

### Termination of Common Trust Fund

#### *1. Action of Board of Directors.*

The board of directors of a trust company in its discretion may direct by resolution the termination of any common

trust fund. A copy of such resolution, certified by the secretary of the trust company, shall be transmitted to the Superintendent of Banks within two days after its adoption.

## *2. Direction of Banking Board.*

The Banking Board, upon recommendation of the Superintendent of Banks, may direct by a three-fifths vote of all its members the termination of any common trust fund.

## *3. Effect of Termination.*

After the adoption of a resolution by the Board of directors or the receipt of notice from the Banking Board directing the termination of any common trust fund all distributions therefrom shall be made in the same manner as if it were a liquidating account.

# ARTICLE X

## Miscellaneous Provisions

### *1. Duplicate of Accounts to be Furnished to Superintendent of Banks.*

To facilitate the certification required by the Banking [fol. 108] Law to be made by the Superintendent of Banks in respect of the investments of a common trust fund, the trust company shall furnish to him within five days of the filing in court of any account two copies thereof certified by one of the principal officers of the trust company.

### *2. Common Trust Funds Restricted to True Fiduciary Purposes.*

The operation of common trust funds for other than true fiduciary purposes is hereby prohibited. The trust investment committee shall not permit any funds of any trust to be invested in any common trust fund if it has reason to believe that such trust was not created or is not being used for bona fide fiduciary purposes. A trust company administering a common trust fund shall not, in soliciting business or otherwise, publish or make representations which are inconsistent with this section or the other provisions of these regulations and, subject to the applicable requirements of law, shall not advertise or publicize the earnings

realized on any common trust fund or the value of the assets thereof.

### *3. Common Trust Fund to be Audited Annually.*

A trust company administering a common trust fund shall, at least once during each period of twelve months, cause an audit to be made of the common trust fund by auditors responsible only to the board of directors of the trust company. The report of such audit shall include a list of the investments comprising the common trust fund at the time [fol. 109] of the audit which shall show the valuation placed on each item on such list by the trust investment committee as of the date of the audit, a statement of purchases, sales and any other investment changes and of income and disbursements since the last audit, and appropriate comments as to any investments in default as to payment of principal or interest. The reasonable expenses of any such audit made by independent public accountants may be charged to the common trust fund.

The trust company shall, without charge, send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the estates, trusts or funds participating in the common trust fund ordinarily would be rendered or shall send advice to each such person annually that the report is available and that a copy will be furnished without charge upon request. Except as may be required by law, the trust company shall not publish or authorize the publication of any such report or the information contained therein and each copy furnished to any person as herein provided must bear a statement to the effect that the publication of such copy or the information contained therein is unauthorized.

### *4. Responsibility of Board of Directors.*

No provisions of these regulations shall be deemed to relieve the board of directors of any trust company of its responsibility for the conduct of the affairs of the trust company and of the fund.

[fol. 110] *5. Relation of Rules and Regulations to Provisions of Banking Law.*

No provisions of these regulations shall be deemed to limit the duties imposed upon trust companies by section one hundred-c of the Banking Law.

### *6. Inspection of Records by Persons Interested.*

All accounting records, registers of participations, valuation schedules, periodic statements, audits under the plan and liquidating account records pertaining to a common trust fund for the period subsequent to that covered by the last judicial account therefor shall be subject to inspection, during banking business hours on the three business days next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating estate, trust or fund.

### *7. Restrictions on Ownership of Participations by the Trustee.*

If a trust company, because of a creditor relationship or any other reason, acquires any interest in a participation in a common trust fund under its administration, the participation shall be withdrawn on the first date on which such withdrawal can be effected in accordance with the provisions of these regulations.

[fol. 111] A trust company administering a common trust fund shall not have any interest in the assets held in such common trust fund, other than in its capacity as fiduciary, except to the extent permitted for a temporary period as provided in this subdivision.

### *8. Management of Common Trust Fund and Fees.*

A trust company administering a common trust fund shall have the exclusive management thereof and shall not charge a fee for the management of the common trust fund, or receive, either from the common trust fund or from any estates, trusts or funds, the funds of which are invested in participations therein, any additional fees, commissions, or compensations of any kind by reason of such participation. The trust company shall not pay a fee, commission, or compensation out of the common trust fund for management. Nothing in this paragraph shall be construed as prohibiting a trust company from reimbursing itself out of a common trust fund for such reasonable expenses incurred by it in the administration thereof as would have been chargeable to the respective participating estates, trusts or funds if incurred in the separate administration of such participating estates, trusts or funds.



### 9. *Effect of Mistakes.*

No mistake made in good faith and despite the exercise of due care in connection with the administration of a common trust fund shall be deemed to be a violation of these [fol. 112] regulations if after the discovery of the mistake the trust company takes promptly whatever action may be practicable in the circumstances to remedy the mistake.

### 10. *Effective Date.*

These regulations shall become effective on August 2, 1943. Adopted July 14, 1943.

Articles III, V, VI, IX and X amended September 12, 1945.

## IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

### GENERAL REGULATIONS OF THE BANKING BOARD—AMENDMENT TO GENERAL REGULATION No. 11

Whereas, pursuant to the authority conferred upon it by subdivision 1(c) of Section 14 of the Banking Law, the Banking Board is empowered to regulate the conduct and management of any common trust fund; and

Whereas, the Banking Board has exercised such power by its General Regulation No. 11 adopted July 14, 1943, effective August 2, 1943, and amended September 12, 1945,

Now, therefore, be it resolved that effective December 1, 1947, paragraphs a and b of Section 2 of Article V, Section 3 of Article V, the first paragraph of Section 1 of Article VI, Section 3 of Article VI, Section 1 of Article IX and Section 6 of Article X of said General Regulation No. 11 be and hereby are amended to read as hereinafter set forth, and Article X of said General Regulation No. 11 be and hereby is amended by renumbering the present Section 10 [fol. 113] to be Section 11 and by adding a new Section 10, to read as hereinafter set forth:

## ARTICLE V

### 2. Method of Valuation.

The following method shall be used in the valuation of investments:

a. (i) *In the case of an obligation of the United States, or of an obligation for which the faith of the*

*United States is pledged to provide for the payment of the interest and principal, the trust investment committee shall use for the valuation of such investment the mean of the most recent dealer bid and asked prices appearing within the five business days next preceding the valuation date in newspapers of general circulation published in the city of New York or in standard financial periodicals.*

(ii) Where there have been recorded sales or bid and asked prices of an investment of the common trust fund, other than an obligation of the United States or an obligation for which the faith of the United States is pledged to provide for the payment of the interest and principal, on [a security exchange or exchanges in the city of New York,] *the New York Stock Exchange or the New York Curb Exchange* within [ten] the five business days next preceding the valuation date, the trust investment committee shall use for the valuation [fol. 114] of such investment the last recorded sale price, if there have been such recorded sales, unless on a day subsequent to such sale and within such [ten] five business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this paragraph recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the city of New York, in standard financial periodicals, or on the records of [a security exchange in the city of New York] *the New York Stock Exchange or the New York Curb Exchange.*

[b.] (iii) *In case recorded sales or bid and asked prices shall not be available for use as provided above, and in the case of all investments other than those mentioned above* [In the case of all other investments], except investments in mortgages, the trust investment committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the trust investment committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last

business day prior to the valuation date. The average [fol. 115] of such estimates shall be used, and each such estimate shall be retained in the records of the common trust fund.

*b. For the purposes of this section, a business day shall mean a day when the New York Stock Exchange or the New York Curb Exchange is open for business.*

### 3. Valuation Schedule.

Within ten *bank* business days after any valuation date, the trust investment committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- b. Its face value.
- c. Its value as carried on the books of the common trust fund.
- d. Its value as determined upon such valuation date.

Each such schedule shall be certified by one or more of the members of the trust investment committee and filed as a permanent record of the common trust fund.

## ARTICLE VI

### 1. Basis and Time of Admissions and Withdrawals.

For the purpose of admissions to and withdrawals from the common trust fund, the principal of the fund shall be [fol. 116] determined by adding to the value of the investments, as determined in accordance with the provisions of Article V, the uninvested cash principal and other items of principal, and by deducting from the total thereof any liabilities, due or accrued, chargeable to principal. For the purpose of computing the value per unit, the principal thus determined shall be divided by the number of existing units and such unit value together with a sum equal to the proportionate share of any income held or accrued and remaining undistributed at the valuation date shall be the basis for admissions to and withdrawals from the common trust fund. In determining the value of a unit, fractions less than one one-hundredth per cent of the original unit value may be

omitted. No participation shall be admitted to or withdrawn from a common trust fund except on the basis of such valuation and as of such a valuation date. A reasonable period, not to exceed seven *calendar* days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participations therein. No participation shall be admitted to or withdrawn from a common trust fund unless a written request for or notice of intention of taking such action shall have been entered in the records of the trust company and approved by the trust investment committee, at least five *bank business* days prior to the valuation date. No such request or notice may be cancelled or countermanded unless such action is taken at least five *bank business* days prior to the valuation date.

[fol. 117] 3. Periodic Statement.

Within ten *bank business* days after any valuation date, the trust investment committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the common trust fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- b. The value per unit.
- c. The income per unit since the preceding valuation date.

Such periodic statements of condition shall be certified by one or more of the members of the trust investment committee and retained as permanent records of the common trust fund.

## ARTICLE IX

### 1. Action of Board of Directors.

The board of directors of a trust company in its discretion may direct by resolution the termination of any common trust fund. A copy of such resolution, certified by the secretary of the trust company, shall be transmitted to the Superintendent of Banks within two *bank business* days after its adoption.

[fol. 118]

## ARTICLE X

## 6. Inspection of Records by Persons Interested.

All accounting records, registers of participations, valuation schedules, periodic statements, audits under the plan and liquidating account records pertaining to a common trust fund for the period subsequent to that covered by the last judicial account therefor shall be subject to inspection, during banking hours on the three bank business days commencing with the seventh bank business day next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating estate, trust or fund.

## 10. "Bank Business Day", "Valuation Date" Defined.

*a. For the purposes of these Regulations, the term "bank business day" shall mean, in the case of each trust company operating a common trust fund, a day on which such trust company is open for business.*

*b. For the purposes of these Regulations, the term "valuation date" shall mean, in the case of each trust company operating a common trust fund, the last bank business day of each succeeding January, April, July and October.*

[10.] 11.



[fol. 119] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY  
 PLAN OF OPERATION OF DISCRETIONARY COMMON TRUST FUND  
 No. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY

Plan of Operation  
 of  
 Discretionary Common Trust Fund  
 No. 1  
 of  
 Central Hanover Bank and Trust  
 Company

ARTICLE I

Section 1.1. *Title.* The identifying title of the common trust fund established pursuant to this Plan shall be "Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company."

Section 1.2. *Purpose.* This common trust fund is established, operated and maintained exclusively for the collective investment and reinvestment of moneys paid over thereto by trusts of which Central Hanover Bank and Trust Company is sole fiduciary or is a fiduciary acting with a co-fiduciary or with co-fiduciaries.

Section 1.3. *Definitions.* Where used in this Plan:

(a) The term "Common Fund" shall mean Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

[fol. 120] (b) The term "Trust Company" shall mean Central Hanover Bank and Trust Company.

(c) The term "Trust Investment Committee" shall mean the Trust Investment Committee appointed to function in the operation of the Common Fund established pursuant to this Plan.

(d) The term "Trustee" shall mean Central Hanover Bank and Trust Company as trustee of the Common Fund.

(e) The term "participating trust" shall mean any trust, moneys of which shall be invested in the Common Fund.

(f) The term "participation" shall mean the interest of a participating trust in the Common Fund.

(g) The term "Banking Law" shall mean the Banking Law of the State of New York.

(h) The term "Banking Board" shall mean the Banking Board of the State of New York.

(i) The term "Superintendent of Banks" shall mean the Superintendent of Banks of the State of New York.

Section 1.4. *Subject to Banking Law and Regulations of the Banking Board.* This Plan shall be subject to the hereafter currently effective provisions of the Banking Law and to the currently effective rules and regulations of the Banking Board pertaining to the operation of common trust funds.

[fol. 121]

## ARTICLE II

Section 2.1. *Who may invest in participations in the Common Fund.* An investment in the Common Fund shall only be made by a trust of which the Trust Company is sole fiduciary or is a fiduciary acting with a co-fiduciary or with co-fiduciaries. The Trust Company shall not invest any of its own funds in the Common Fund.

Section 2.2. *Approval in certain cases for admission of a participation.* No funds of a trust shall be invested in a participation in the Common Fund without the approval of each person other than the Trust Company who is a co-fiduciary of such trust and the approval of each person, if any, whose consent is required for the investment of the funds of such trust.

Section 2.3. *Limitation on amount of participation by any trust.* No funds of any trust shall be invested in a participation in the Common Fund if such investment would result in such trust having invested in the aggregate in the Common Fund an amount in excess of ten per cent (10%) of the value of the assets of the Common Fund, as determined by the Trust Investment Committee, or the sum of fifty thousand dollars (\$50,000) or such other sum as may be prescribed from time to time by the regulations of the Banking Board, whichever is less at the time of the invest

ment. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause any one trust to have invested in the aggregate in all such common trust funds an amount in excess of the sum [fol. 122] of fifty thousand dollars (\$50,000) or such other sum as may be prescribed from time to time by the regulations of the Banking Board. In applying the limitations contained in this Section, if two or more trusts are created by the same settlor or settlors and as much as one-half of the income or principal or both of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one. In determining whether the value of the interest of any trust is more than ten per cent (10%) of the value of the assets of the Common Fund, the computation shall be made with respect to the Common Fund as increased by the amount of the proposed investment.

*Section 2.4. Notice of first investment.* At the time of making the first investment of the funds of any trust in the Common Fund the Trust Company shall send a notice to each person of full age and sound mind whose name and address are known to the Trust Company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes:

(a) those then entitled to share in the income from the trust, and

(b) those who would be entitled to share in the principal of the trust if the event upon which such trust will become distributable should have occurred at the time of sending such notice.

Such notice shall apprise such person that moneys of such trust have been invested in the Common Fund and that [fol. 123] from time to time additional moneys of such trust may be invested in the Common Fund without further notice. No further notice of any later investment of additional moneys of such trust in the Common Fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said trust in

the Common Fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of Subdivisions 9, 10, 11, 12, 13, 14 and 15 of Section 100-c of the Banking Law. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a post-paid wrapper addressed to such person at the last post office address furnished by such person to the Trust Company, or if no such address has been furnished, then to the last post office address, if any, known to the Trust Company. Failure to mail such notice shall not render invalid any investment in such Common Fund. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of the Trust Company with respect to the Common Fund, such notice shall also state the date of each investment of the moneys of the trust in which the person so notified is interested and shall state that such proceeding is pending, and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding, it shall state the date of each such investment and shall state that such decree has been entered and the date and place of such entry.

[fol. 124]

### ARTICLE III

Section 3.1. *Management.* The Common Fund shall be under the exclusive management and control of the Trust Company.

The investments of the Common Fund shall be kept separate from all other property belonging to or in the custody of the Trust Company. Such investments shall be subject to the joint control of two or more duly authorized officers or employees of the Trust Company.

The Board of Trustees of the Trust Company by resolution shall appoint a Trust Investment Committee, which shall be composed of at least three members, who shall be capable and experienced officers of the Trust Company. Alternates for regular members of the Committee, by like action of the Board, may be appointed to serve when such regular members are unable to attend. The Trust Investment Committee shall be charged with responsibility for the management and conduct of the Common Fund. It shall

keep full and complete minutes of all decisions and activities relating thereto, including:

(a) The approval in each instance of admission to participation, with notations as to eligibility thereof for the funds of the participating trust;

(b) The withdrawal of any participation in whole or in part;

(c) The approval of every purchase and sale of an investment for the Common Fund;

(d) The designation of valuation dates other than those specified by law;

[fol. 125] (e) The determination, on each valuation date, of the eligibility of each investment of the Common Fund;

(f) Every review of the Common Fund and its investments, with notations of decisions regarding assets to be sold, held, exchanged or otherwise dealt with; and

(g) The determination to transfer any investment to a liquidating account.

The Trust Company shall appoint by resolution of the Board of Trustees a qualified and competent officer or officers to administer the Common Fund. Such administrative officer or officers shall direct the activities of the Common Fund under the supervision and guidance of the Trust Investment Committee and shall be responsible for the execution of the orders and directions of the Trust Investment Committee and for the maintenance of proper accounting records relating to the Common Fund.

**Section 3.2. Ownership.** The ownership of the assets and investments of the Common Fund shall be in the Trust Company as Trustee.

**Section 3.3. Investment Power.** The Common Fund shall be a discretionary common trust fund. Subject to the provisions of Section 3.4 hereof, the Trustee may invest and reinvest any moneys at any time forming any part of the Common Fund in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, common and preferred stocks,



bonds, debentures, notes and other evidences of indebtedness, [fol. 126] and shall not be limited in the making of such investments to securities permitted by law for investment by trustees.

Section 3.4. *Limitations on investments.* No investment for the Common Fund shall be made in stocks or bonds or other obligations of any one person, firm or corporation which would cause the total amount of investment in stocks or bonds or other obligations issued or guaranteed by such person, firm or corporation to exceed ten per cent (10%) of the value of the Common Fund as determined by the Trust Investment Committee, provided that this limitation shall not apply to investments in obligations of the United States or for the payment of the principal and interest of which the faith and credit of the United States shall be pledged. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause the aggregate investment for all such common trust funds in such stocks, bonds or obligations to exceed such limitation.

No investment for the Common Fund shall be made in any one class of shares of stock of any one corporation which would cause the total number of such shares held by the Common Fund to exceed five per cent (5%) of the number of such shares outstanding. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause the aggregate investment for all such common trust funds in any one class of shares of stock of any one corporation to exceed such limitation.

The Trust Company shall not purchase for the Common Fund any securities from itself or any affiliate.

[fol. 127] No investment shall be made for the Common Fund in the securities of any corporation, association, business trust or similar organization engaged principally in the issue, flotation, underwriting, public sale or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities.

Section 3.5. *Power to administer assets.* The Trustee shall have and may exercise the same powers in the administration of the Common Fund as if it were the absolute owner thereof including, without limiting the generality of the foregoing, the power to sell or exchange the same without obligation on the part of any person dealing with it to in-

quire as to the application of any moneys received by it; to consent to, join in or oppose any plan of reorganization and pursuant thereto, or to any right of conversion granted by such plan, to receive in exchange for any such investment another investment although the same may not be eligible for original investment in the Common Fund (but if any ineligible investment be so received it shall be sold or set apart in a liquidating account as provided in Section 6.6 hereof), to cause any securities held for the Common Fund to be registered in the name or names of its nominee or nominees and to retain any securities in such condition that they will pass by delivery; and to vote in person or by proxy, discretionary or otherwise, any stock or other securities in the Common Fund.

[fol. 128]

#### ARTICLE IV

Section 4.1. *Division of Common Fund into units.* The Common Fund shall be divided into units and the proportionate interest of each participating trust shall be evidenced by the number of units allocated to it based upon the amount of the funds of such participating trust paid into the Common Fund. The original unit of participation shall be one dollar (\$1). When additional funds are added to the Common Fund, the amount so added shall be equal to the then value of the principal and income of one or more of such units and the number of units shall be increased accordingly.

#### ARTICLE V

Section 5.1. *Time of valuation and by whom made.* Investments in the Common Fund shall be valued by the Trust Investment Committee on or as of the opening of business on the last business day of January, April, July and October of each year and as of the opening of business on such other date or dates as the Trust Investment Committee or a court of competent jurisdiction may direct pursuant to the Banking Law.

Section 5.2. *Valuation of investments.* The Trust Investment Committee shall use the following method in the valuation of investments:

- a. Where there have been recorded sales or bid and asked prices of an investment of the Common Fund on a security exchange or exchanges in the City of New

York within ten business days next preceding the valuation date, the Trust Investment Committee shall use for the valuation of such investment the last recorded sale price; if there have been such recorded sales, unless on a day subsequent to such sale and within such ten business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this subdivision recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the City of New York, in standard financial periodicals, or on the records of a security exchange in the City of New York.

b. In the case of all other investments except investments in mortgages, the Trust Investment Committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the Trust Investment Committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last business day prior to the valuation date. The average of such estimate shall be used and each such estimate shall be retained in the records of the Common Fund.

c. In the case of investments in mortgages, the Trust [fol. 130] Investment Committee shall secure, prior to any valuation date, from not less than two persons qualified in the opinion of the Trust Investment Committee to give an opinion as to the value of the mortgage in question a written estimate of the value of such mortgage. At least one of the persons making such valuation shall not have participated in the making of the last preceding valuation. The average of such estimates shall be used and each such estimate shall be retained in the records of the Common Fund. Notwithstanding the foregoing, in the event that the Trust Company shall have in its files such a written estimate of value made within one year of the valuation date, such estimate may be used. The real estate securing each such mortgage investment shall be appraised at

least once every three years by two persons, one of whom shall not have participated in the last preceding appraisal of such real estate. Such persons shall be appointed by the Trust Investment Committee and shall, in the opinion of such committee, be familiar with real estate values in the vicinity in which such real estate is situated and qualified to make such appraisals. The persons so appointed shall actually inspect such real estate and shall so certify in a written certificate of appraisal, which shall be filed and preserved in the records of the Common Fund. In preparing a written estimate of the value of any mortgage, due consideration shall be given, by the persons making such valuation, to the last written certificate of appraisal of the [fol. 131] property covered by such mortgage.

d. In the case of a stock where a dividend has been declared but has not been paid and the amount of such dividend has been included as income, the amount of such dividend shall be deducted from the value of the stock as determined in subdivisions (a) or (b) of this Section, unless such value shall be an ex-dividend valuation.

e. An investment purchased and awaiting payment against delivery shall be included for valuation purposes as a security held, and the cash account shall be adjusted to reflect the purchase price including the brokers' commissions and other expenses incurred in the purchase thereof but not disbursed as of the valuation date.

f. An investment sold but not delivered pending receipt of proceeds shall be valued at the net sales price.

g. For the purpose of valuation of an investment, except an investment sold but not delivered, it shall not be necessary to deduct from the value ascertained as above indicated brokers' commissions or other expenses which would be incurred upon a sale thereof.

**Section 5.3. *Principal valuation per unit.*** The Trust Investment Committee shall use the following method in determining the principal value per unit:

To the valuation of the investments determined as provided in Section 5.2 hereof there shall be added



(a) uninvested cash principal; (b) the value of any rights or stock dividends which may have been declared but not received by the Trustee as of the valuation date when the security has been valued ex-rights and ex-dividend; (c) such portion as shall constitute principal of any extraordinary or liquidating dividend which may have been declared but which is unpaid as of the valuation date when the particular security has been valued ex-dividend; (d) any other items of principal. There shall be deducted from the sum so ascertained all expenses chargeable to principal due or accrued. The net principal value thus determined shall be divided by the number of existing units in order to ascertain the principal value of a unit.

Section 5.4. *Income valuation per unit.* The Trust Investment Committee shall use the following method in determining the income value per unit:

From the income on hand and accrued there shall be deducted the expenses and liabilities due and accrued which are chargeable to income. The amount of net income thus determined shall be divided by the number of existing units in order to ascertain the income value per unit.

Section 5.5. *Valuation schedule—periodic statements.* Within ten business days after any valuation date, the Trust Investment Committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- [fol. 133] b. Its face value.
- c. Its value as carried on the books of the Common Fund.
- d. Its value as determined upon such valuation date.

Within ten business days after any valuation date, the Trust Investment Committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the Common Fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- b. The value per unit.



c. The income per unit since the preceeding valuation date.

Such schedules and periodic statements of condition shall be certified by one or more of the members of the Trust Investment Committee and retained as permanent records of the Common Fund.

## ARTICLE VI

Section 6.1. *Each unit to represent a proportionate interest in the Common Fund.* Admissions to the Common Fund shall be made in such manner and in such amount that the units of participation of a participating trust may at all times be determined. Each unit of participation shall have a proportionate equal beneficial interest in the Common [fol. 134] Fund and none shall have priority or preference over any other.

Section 6.2. *Basis and time of admissions to and withdrawals from the Common Fund.* No admission to or withdrawal from the Common Fund shall be permitted except on the basis of the principal and income unit value determined as prescribed in Article V hereof and no participation shall be admitted to or withdrawn from the Common Fund except as of a valuation date. A reasonable period not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participation therein.

Section 6.3. *Notice of intention as to admissions to and withdrawals from the Common Fund.* No admission to the Common Fund shall be permitted unless at least five days prior to the valuation date notice of intention to participate shall be duly noted in the records of the Trust Company and approved by the Trust Investment Committee. No such notice shall be cancelled or countermanded unless such action is taken at least five days prior to the valuation date.

No withdrawals shall be made from the Common Fund unless at least five days prior to the valuation date notice of intention ~~to make such withdrawal~~ shall have been given to the Trustee by a person entitled to require such withdrawal or, in lieu of such notice, the determination to make such withdrawal shall have been duly noted in the records of the Trust Company and approved by the Trust Investment [fol. 135] Committee. Where a participation in the Com-

mon Fund is held by the Trust Company in conjunction with one or more other persons acting in a fiduciary capacity, such participation shall be withdrawn from the Common Fund at the written request of any such other persons, provided, however, that the provisions hereof shall not be deemed to otherwise enlarge or otherwise modify the powers and authority conferred upon such person or persons so acting in such fiduciary capacity by the terms and provisions of the instrument creating the participating trust. If in any participating trust the consent of any person or persons other than the fiduciary or fiduciaries is required for the investment of the funds of such trust, the participation of such participating trust shall be withdrawn upon the written request of any such person. No such request or notice shall be cancelled or countermanded unless such action is taken five days prior to the valuation date.

Section 6.4. *Percentage of cash and readily marketable securities as affecting admissions and withdrawals.* Prior to any admission to or withdrawal from the Common Fund the Trust Investment Committee shall determine what percentage of the value of the assets of the Common Fund is composed of cash and readily marketable securities. If the Committee determines that after effecting the admissions and withdrawals which are to be made less than forty per cent (40%) of the value of the remaining assets of the Common Fund would be composed of cash and readily marketable securities, no admissions to or withdrawals from the Common Fund shall be permitted as of the valuation date [fol. 136] upon which such determination is made, but nothing herein contained shall prohibit a ratable distribution to all of the participating trusts.

Section 6.5. *Satisfaction of participations withdrawn.* Participations withdrawn in whole or in part may at the option of the Trustee or by order of a court of competent jurisdiction be satisfied by distribution from the Common Fund in cash or ratably in kind or partly in cash and partly ratably in kind provided that all distributions made as of one valuation date shall be made on the same basis. Before any distribution in cash is made, the Trust Investment Committee shall determine whether any investment remaining in the Common Fund would be unlawful for one or more of the participating trusts if funds of such participating trust

or trusts were being invested at that time, and if there be any such investment, no distribution shall be made in cash until such investment has been eliminated from the Common Fund either through sale, distribution in kind or transfer to a liquidating account.

The proportion of any investment distributed in kind to any participating trust shall not exceed the proportion established by the ratio which the total amount withdrawn bears to the value of the whole Common Fund.

The amount distributed upon the withdrawal of a participating trust in whole or in part shall be equal to the value as to principal and income of the participation or part thereof on the date as of which such withdrawal is effective provided that the Trustee may withhold such part of the unit income value as is accrued but unpaid in which event the amount so withheld shall be distributed to the participating trust when received by the Trustee. In the event that any income accrued but unpaid is distributed upon the withdrawal of a participating trust and such income is not thereafter collected by the Trustee in whole or in part the Trustee shall have the right to charge and to collect from the participating trust the amount of said income not collected.

The investment of a participating trust in the Common Fund shall not be deemed to have been wholly withdrawn therefrom until the share of such trust if any in any liquidating account provided for in Section 6.6 hereof shall have been completely withdrawn from such liquidating account.

If the Trust Investment Committee should determine on any valuation date that any investment in the Common Fund has ceased to be eligible as a new investment in the Common Fund, no admissions to or withdrawals from the Common Fund shall be permitted until such ineligible investment has been sold or placed in a liquidating account as provided in Section 6.6 hereof.

**Section 6.6. Liquidating account.** If the Trust Investment Committee should determine that an investment in the Common Fund has ceased to be eligible as a new investment in the Common Fund, such Committee shall either sell such investment or set it apart in a liquidating account. The Committee may also place in such liquidating account any investment in the Common Fund although it has not become ineligible as a new investment, when the Trust Investment

Committee deems it advisable to distribute such investment [fol. 138] in kind or to liquidate it. Each liquidating account shall be maintained and administered for the benefit of and the proceeds thereof shall be distributed solely to the trusts participating in the Common Fund at the time such investment is so placed in such liquidating account. Each distribution from a liquidating account whether in cash or in kind shall be made ratably in accordance with the respective interests in such account. It shall be the duty of the Trustee to effect liquidation of the investments held in each liquidating account and the distribution of the proceeds thereof when, but not until, it deems such liquidation to be for the best interests of those beneficially interested therein. No further monies shall be invested in a liquidating account except that in order to protect any investment held therein the Trustee may borrow monies from others including the Trust Company on the security of the investments held in such liquidating account.

In any proceeding for the settlement of the account of the Trustee with respect to the Common Fund each liquidating account if not closed and fully accounted for theretofore shall be deemed to be part of the Common Fund.

At the time of the creation of each liquidating account the Trust Investment Committee shall cause to be prepared a schedule showing the interest of each participating trust therein. When the assets of a liquidating account shall have been completely distributed such schedule shall be thereafter held as part of the permanent records of the Common Fund.

[fol. 139]

## ARTICLE VII

Section 7.1. *Accounting records--allocation to principal and income.* The Trustee shall keep full books of account in which all transactions relating to the Common Fund and to the liquidating accounts shall be recorded. The Trustee shall keep two accounts relating to the Common Fund, one of which shall be a "principal account" in which shall be recorded all transactions relating to principal, and the other of which shall be an "income account" in which shall be recorded all transactions relating to income.

There shall be credited to principal all rights received or the proceeds of sale thereof, all profits realized on the sale of investments, all stock dividends and such part

of any extraordinary or liquidating dividend as shall constitute principal, together with all other principal credits. There shall be charged against principal all losses on the sale of investments and all expenses properly chargeable to principal, including any taxes and assessments chargeable to the principal of the Common Fund pursuant to any statute or regulation.

Premiums paid on the purchase of investments for the Common Fund shall not be amortized.

There shall be credited to income all interest accrued or received and ordinary cash dividends declared or received and such part of any extraordinary or liquidating dividend as shall constitute income, as well as any other proper income credits. There shall be charged against income account all expenses due and accrued properly chargeable to income, including any taxes and assessments chargeable to the income of the Common Fund pursuant to any statute or regulation.

[fol. 140] Upon admission of any new participation the funds received from the participating trust representing the principal unit value as of the valuation date on which it is admitted, or multiples thereof, shall be credited to principal account and the funds received as representing income unit value shall be credited to income account.

Upon withdrawal of a participation in whole or in part there shall be charged against principal and income accounts respectively such part of the amount withdrawn as is equal to the principal unit value and income unit value on the valuation date as of which such withdrawal is effective applicable to the participation or part thereof so withdrawn.

Section 7.2. *Distribution of income.* The net income of the Common Fund shall be computed on an accrual basis at each valuation date. The income shall be distributed ratably to participating trusts not less frequently than quarter-annually on the basis of income accrued and received.

## ARTICLE VIII

Section 8.1. *Audit of accounts.* The Trustee at least once during each period of twelve months shall cause an audit to be made of the Common Fund and of each liquidating account by auditors responsible only to the Board of Trustees of the Trust Company. The report of such audit shall include a list of the investments comprising the Common



Fund at the end of the period covered by the audit which shall show the valuation placed on each item on such list [fol. 141] by the Trust Investment Committee at the end of the period covered by said audit, a statement of purchases, sales and any other investment changes, of income and disbursements since the last audit and appropriate comments as to any investment in default as to payment of principal or interest.

Upon receipt of the report of such audit the Trust Company may send a copy thereof without charge to the income beneficiaries of each of the participating trusts, to any person acting as one of the fiduciaries in respect of such trust and to any other person to whom a periodic statement covering the transactions of such trust ordinarily would be rendered or the Trust Company shall send advice to each such person that the report is available and that a copy will be furnished without charge upon request. Except as may be required by law, the Trust Company shall not publish or authorize the publication of any such report or the information contained therein and each copy furnished to any person as herein provided shall bear a statement to the effect that the publication of such copy or the information contained therein is unauthorized.

Section 8.2. *Expenses of audit.* The compensation and expenses of the auditors, other than auditors who are regular employees of the Trust Company, for the audit of the Common Fund shall be proper charges against and payable out of the principal of the Common Fund and the cost of printing and other proper charges in relation to such audit shall also be chargeable against and payable out of the principal of the Common Fund. The compensation and expenses of the auditors other than auditors regularly employed by [fol. 142] the Trust Company in respect of the audit of the liquidating accounts, printing costs and other proper charges in respect of the audit of such liquidating accounts shall be chargeable to and payable out of the principal of such liquidating accounts.

Section 8.3. *Accounting.* The Trustee, not less than twelve nor more than fifteen months after the date when the Common Fund is established and triennially thereafter, shall file an account of its proceedings in respect of the Common Fund either in the office of the Clerk of the Supreme Court of the County of New York or in the Office of the Sur-

rogate's Court of the County of New York and within five days thereafter shall furnish the Superintendent of Banks with two copies thereof certified by one of the officers of the Trust Company. The Trustee shall thereupon proceed with the settlement of such account in accordance with the provisions of Section 100-c of the Banking Law.

## ARTICLE IX

**Section 9.1. *Amendments to Plan.*** This Plan may be amended from time to time by resolution of the Board of Trustees of the Trust Company. Any amendment adopted by such Board shall be binding upon all participating trusts, co-fiduciaries and beneficiaries thereof. An amendment shall become effective ten days after a copy thereof shall have been delivered to the Superintendent of Banks. All amendments shall be filed in the office of the Trust Company with the original Plan, and notice thereof shall be sent to [fol. 143] all persons to whom notice of the initial investment in the Common Fund is required to be given under Section 2.4 hereof.

**Section 9.2. *Termination of Plan.*** The Board of Trustees of the Trust Company in its discretion may direct by resolution the termination of the Common Fund. A copy of any such resolution certified by the Secretary of the Trust Company shall be transmitted to the Superintendent of Banks within two days after adoption.

After the adoption of a resolution by the Board of Trustees of the Trust Company terminating the Common Fund all distributions therefrom shall be made in the same manner as if the Common Fund were a liquidating account.

## ARTICLE X

**Section 10.1. *Documentation.*** No form of documentation shall be issued as evidence of participation in the Common Fund.

## ARTICLE XI

**Section 11.1. *Right of Inspection.***

(a) A copy of this Plan shall be kept on file at the principal office of the Trust Company, 70 Broadway, Borough of Manhattan, City, County and State of New York, until the Common Fund shall have been completely liquidated and shall be available for inspection

during banking hours by any person interested in any participating trust. A copy of this Plan shall be given [fol. 144] on reasonable request to each person interested in any participating trust.

(b) All accounting records, registers of participations, valuation schedules, periodic statements, audits under this Plan and liquidating account records pertaining to the Common Fund for the period subsequent to that covered by the last judicial account of the Common Fund shall be subject to inspection at the principal office of the Trust Company at 70 Broadway, Borough of Manhattan, City, County and State of New York, during banking business hours on the three (3) business days next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating trust.

**Section 11.2. *Notices.*** All notices or reports required to be given by the Trustee (except as otherwise specifically provided by Section 2.4 hereof or by any Regulation of the Banking Board or by law) shall be given by delivering a copy thereof in person either within or without the State of New York, or by depositing a copy thereof in a post office or in any mail box regularly maintained by the Government of the United States, properly enclosed in a postpaid wrapper addressed to the person entitled to receive such notice or report at the last post office address furnished by such [fol. 145] person to the Trust Company, or if no such address has been furnished, then to the last known post office address, if any, known to the Trust Company.

**Section 11.3. *Successors and assigns.*** This Plan and all of the provisions thereof shall be binding upon and enure to the benefit of the Trustee and its successors, the trustees of each participating trust and their successors, and each person having an interest in any participating trust, the Common Fund or any liquidating account, his executors, administrators, successors and assigns.

**Section 11.4. *New York Law to control.*** All questions which may arise relating to the construction, validity, oper-

ation and effect of this Plan shall be governed by the Laws of the State of New York.

In Witness Whereof, Central Hanover Bank and Trust Company has caused this Plan of Operation of its Discretionary Common Trust Fund No. 1 to be signed and its seal to be hereto affixed and attested by its proper officers thereunto duly authorized this 20th day of December, 1945.

Central Hanover Bank and Trust Company, by W. A. Eldridge, Vice President. (Seal.)

Attest: L. E. Lamb, Assistant Secretary.

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[fol. 146] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY  
SPECIMEN FORM OF NOTICE OF FIRST INVESTMENT IN COMMON TRUST FUND NO. 1

Central Hanover Bank and Trust Company

Seventy Broadway

New York 15, N. Y.

DEAR

Central Hanover Bank and Trust Company has established its Discretionary Common Trust Fund No. 1 under Section 100-c of the Banking Law of the State of New York pursuant to the Plan of Operation thereof dated December 20, 1945.

We hereby give notice that we have invested \$—— of the moneys of the above trust in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and that from time to time additional moneys of such trust may be invested by us in such Common Trust Fund without further notice.

Appended hereto is a copy of the provisions of the Banking Law of the State of New York relating to the sending of this notice and to the judicial accountings we are required to make for this Fund.

Very truly yours, ————

[fol. 147] Subdivision 9, 10, 11, 12, 13, 14, and 15 of Section 100-C of the Banking Law of the State of New York

9. At the time of making the first investment of any estate, trust or fund in a common trust fund the trust company maintaining such common trust fund shall send a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice. Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional moneys of such estate, trust or fund may be invested in such common trust fund without further notice. No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a postpaid wrapper addressed to such person at the last post office address furnished by such person to the trust company or if no such address has been so furnished then to the last post office address, if any, known to said trust company. The affidavit of the person mailing such notice shall constitute prima facie proof of the mailing thereof and the affidavit of an officer of the trust company in charge of the estate, trust or fund at the time of the sending of such notice concerning the names of the persons then known to the trust company to be or to claim to be included in the class or classes above mentioned and of the last post office address



of each such person, if any, so furnished or known to the trust company shall be prima facie proof of the facts therein set forth. Failure to mail such notice shall not render invalid any investment in such common trust fund. The decree entered in any proceeding instituted for the judicial settlement of an account of the trust company in respect of such common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice but to whom such notice was not sent unless notice of all investments made prior thereto by the estate, trust or fund in which such person is interested shall have been sent to such person at least thirty days prior to the [fol. 149] entry of such decree or, if such notice is sent less than thirty days prior to the entry of such decree, unless such person shall fail within sixty days after the mailing of such notice to him to apply to vacate the said decree as to him. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of such trust company with respect to such common trust fund, such notice shall also state the date of each investment of the moneys of the estate, trust or fund in which the person so notified is interested and shall state that such proceeding is pending, and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding it shall state the date of each such investment and shall state that such decree has been entered and the date and place of such entry.

10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate.

[fol. 150] 11. Such petition shall set forth (a) the name and address of the petitioner; (b) the date on which such common trust fund was established; (c) the name or designation, if any, by which it is known; (d) the date of the judicial settlement of the next prior account filed, if any, relating to such common trust fund, and (e) a list of all the participating estates, trusts or funds any part of which shall have been invested in such common trust fund unless such investment shall have been wholly withdrawn therefrom prior to the period covered by such account and such withdrawal shall have been set forth in a prior account. In the case of any such estate, trust or fund, in respect of which another or others are acting jointly with the trust company in a fiduciary capacity, the name of such other or others shall be stated in such list. In such list the participating estates, trusts or funds shall be adequately described by stating: in the case of an investment in behalf of a decedent's estate, the name of the decedent; in the case of an investment in behalf of an infant, the name of the infant; in the case of an investment in behalf of an incompetent, the name of the incompetent; in the case of an investment in behalf of a testamentary trust, the name of the decedent under whose will such trust was established and if there be more than one trust under such will, the number of the paragraph thereof establishing such trust or other appropriate identification; in the case of an investment in behalf of any other trust, the name of the grantor, donor, trustor or creator of the trust, and the date of the instrument creating or defining such trust; in the case of every other investment in behalf of any other fund, such description thereof as will [fol. 151] reasonably identify the same.

12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in

a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, [fol. 152] habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney.

13. The superintendent shall cause an examination to be made of the investments acquired or held by the trust company for such common trust fund during the period covered by such account and, on or before the return date of the citation or notice, shall certify in writing to the court in which the accounting proceeding is pending whether the investments reported in such account as on hand or the proceeds of any of those liquidated since the date of such account or reinvestments of any such proceeds were actually held by the trust company at the date of such examination. In the case of a legal common trust fund he shall also certify (a) whether in his judgment each of the investments acquired by the trust company and set forth in such account was,

when so acquired, an investment eligible for legal common [fol. 153] trust funds as prescribed in this section, and (b) whether in his judgment any investment held by the trust company at any time during the period covered by such account ceased to be an investment so eligible for legal common trust funds and, if so, when it so became ineligible. The superintendent shall have no other duty or responsibility in respect of the administration of common trust funds. The special guardians and attorneys appointed by the court as hereinbefore provided may accept such certificate as proof of the eligibility or ineligibility for legal common trust funds of any investment set forth in such account. The facts stated in such certificate shall be presumptively established thereby. The accounting trust company shall pay to the superintendent his reasonable expenses incurred in making such examination and certificate and such payment shall be a charge against the principal of such common trust fund.

14. Except as otherwise herein provided, such proceeding shall be conducted in the same manner as any other proceeding for the voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee. Subject to the limitations set forth in subdivision nine hereof the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.

[fol. 154] 15. In any action or proceeding for the judicial settlement of the account of proceedings of any such trust company or any such trust company and one or more other persons acting in conjunction with it in any fiduciary capacity in respect of any estate, trust or fund the whole or any part of which shall have been invested in such a common trust fund, it shall be sufficient to set forth in such account the amount of such estate, trust or fund invested in such common trust fund and the amounts thereafter received for such estate, trust or fund from such common trust fund and the interest, if any, retained in such common trust fund together with a reference to all accounts with respect to such common trust fund so filed and judicially



settled as hereinbefore provided covering the period of all such investments. A judgment or decree judicially settling the account of proceedings of a trust company in any fiduciary capacity when acting either alone or with one or more others with respect of any estate, trust or fund the whole or any part of which shall have been invested in a common trust fund shall not preclude any party interested therein, upon the next judicial settlement of the account of the proceedings of said trust company with respect to such common trust fund, from questioning and objecting to any action or proceeding taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously judicially settled account of such trust company with respect to such common trust fund and up to and including the time when the share or interest of such estate, trust or fund in such common trust fund shall have been wholly withdrawn therefrom.

[fol. 155] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

SPECIMEN FORM OF AFFIDAVITS

Affidavit of Officer in Charge

STATE OF NEW YORK,

County of New York, ss:

—, being duly sworn deposes and says: That he is a — of Central Hanover Bank and Trust Company in charge of Trust No. — under (Will) (Agreement) of — That the names and last post-office addresses furnished or known to the Trust Company of all persons known to the Trust Company to be or to claim to be included in the class or classes to whom a notice of investment for such trust in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company is required to be mailed under the provisions of Section 100-C of the Banking Law of the State of New York are as follows:

Sworn to before me this — day of —, 19—.



[fol. 156]

## AFFIDAVIT OF MAILING

STATE OF NEW YORK,

County of New York, ss:

—, being duly sworn, deposes and says: That he is over twenty-one years of age and is employed by Central Hanover Bank and Trust Company, and that he mailed to each of the persons listed in the above affidavit a notice of the investment of funds in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company in the form attached hereto, by depositing the same on —, 19— in a mailbox regularly maintained by the government of the United States at No. 70 Broadway, Borough of Manhattan, City, County and State of New York, properly enclosed in post-paid wrappers addressed to each such person at the address shown in the above affidavit.

Sworn to before me this — day of —, 19—.

[fol. 157] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

OPINION OF COLLINS, S.

(The New York Law Journal, November 7, 1947)

[Italics so in original]

The petitioner established a discretionary common trust fund on January 31, 1946, pursuant to a certificate of authority issued by the Banking Board of the State of New York (Banking Law, sec. 100-c, subdiv. 1; Regulations, Banking Board, Art. I, 1). In obedience to the legislative mandate that not "less than twelve nor more than fifteen months after the date on which a common trust fund is established" the trustee must file an account of its proceedings, the petitioner filed its account on March 28, 1947, together with a petition for its judicial settlement (Banking Law, sec. 100-c, subdiv. 10). Upon the filing of the petition, the court appointed two special guardians as prescribed by subdivision 12 of the statute, one to represent infants, incompetents and persons known or unknown who do not otherwise appear in the proceeding and who have any interest in

the *income* of the fund and the other to represent similar persons interested in the *principal* or *capital* of the fund. The proceeding for the settlement of the account was thereupon conducted in accordance with the requirements of law. No person has appeared in the proceeding except the petitioner and the two special guardians.

The special guardian representing income beneficiaries filed a preliminary report challenging the jurisdiction of this court to render a decree in the proceeding. The grounds of the preliminary challenge to jurisdiction are identical [fol. 158] with those upheld by the learned surrogate in *Matter of Security Trust Co. of Rochester* (189 Misc., 748, 70 N. Y. Supp., 2d, 260), namely, that *first*, the account shows that petitioner has commingled in the common trust fund investments from *inter vivos* trusts and from testamentary trusts and this court has no jurisdiction at all over *inter vivos* trusts and therefore lacks power to make a valid decree herein; and *second*, the provisions in section 100-c of the Banking Law respecting notice of the proceeding for judicial settlement of the account are wholly insufficient to meet the requirements of "due process of law" under the Federal and State Constitutions, and accordingly the notice given to persons interested in the participating estates is inadequate to confer jurisdiction upon the court to make a binding decree.

The petition for the settlement of the account shows that during the period covered by the account there were one hundred thirteen estates or funds participating in the common trust fund, of which fifty-six were trusts created by agreements of trust and fifty-seven were trusts created by testamentary instruments. The gross capital fund accounted for is \$2,926,437.25.

There can be no doubt that the "jurisdiction of the surrogate is the creation of statute. If not conferred upon him it does not exist" (*People ex rel. Safford v. Surrogate's Court*, 229 N. Y., 495, 497). We must turn, therefore, to the statutory authority to entertain this proceeding. It is found in chapter 687 of the Laws of 1937, which added section 100-c to the Banking Law (secs. 1 and 2) and amended section 40 of the Surrogate's Court Act by the addition of a new subdivision 10 (sec. 4). The first reference to the jurisdiction [fol. 159] of the surrogate is in subdivision 10 of the new section 100-c. That subdivision has been amended in re-

spect of the *time* of filing accounts (L. 1943, chap. 602), but remains unchanged in respect of the court wherein the account may be filed. The statute in so far as material reads:

“ . . . each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either* in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or *in the office of the surrogate of such county* and shall within five days thereafter furnish the superintendent (of banks) with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court *or in the surrogate's court if the account is filed in the office of the surrogate.*”  
(Emphasis supplied.)

Section 40 of the Surrogate's Court Act, as amended by the very same legislative enactment, reads:

“Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

“10. To settle, as provided in the Banking Law, the [fol. 160] account by a corporate fiduciary of its proceedings in respect of a common trust fund maintained by it pursuant to such law.”

It would seem that there is here a legislative grant of authority too clear to admit of serious doubt. We ascribe to the words of the statute their plain and ordinary meaning. A trust company maintaining a common trust fund is told that within a prescribed time it must file an account of its proceedings in respect thereof and that it may do so either in the Supreme Court in the county where it maintains its principal office or in the Surrogate's Court of that county. It is told further that if its account is filed in the Surrogate's Court it *must* proceed with its judicial settlement in that court. Finally, the Surrogate is given express authority to settle the account of a trustee of a common trust fund

maintained pursuant to the banking law. The grant of power to the Surrogate in respect of the settlement of the account of a trustee of a common trust fund is not restricted or made conditional in any way.

If there could be any possible lingering doubt as to the broad jurisdiction granted to the Surrogate by the quoted text, it is completely dispelled when the text is read in the light of the entire section. It is not disputed that under the terms of section 100-c a corporate fiduciary may invest in a single common trust fund any moneys held by it "as executor, administrator, guardian, *personal* or *testamentary* trustee, or committee" (subdiv. 1; emphasis supplied). The only restriction placed upon the fiduciary of the estate or trust is that such investment cannot be made where the instrument, order, decree or judgment under which the moneys are held forbids such investment. Only one distinction is made by the Legislature in respect of separate types or categories of common trust funds and that distinction is based upon the investment powers of the fiduciary and not upon the form of the instrument under which he holds the moneys. "Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund" (subdivision 3). Within the limitations of subdivision one of the statute, there may be invested in a legal common trust fund "the moneys of *any estate, trust or fund.*" In a discretionary common trust fund there may be invested "the moneys of *any estate, trust or fund*" when the instrument or order under which the moneys are held gives the fiduciary certain broad powers of investment specified in the statute. The division of common trust funds into two broad types based upon the investment powers of the fiduciary is reasonable and logical. A division into classes based upon the form of the instrument under which the fiduciary holds the funds would serve no useful purpose and would require further subdivisions within each category, thus destroying the concept of a *common* fund and creating a multitude of small, separate funds. It is likewise clear beyond doubt that when a common trust fund includes investments by estates, testamentary and inter vivos trusts, the trustee must account for all of its transactions in the one accounting proceeding (Banking Law, sec. 100-c, subdivs. 10, 11; *Matter of Security Trust Co. of Rochester*, supra). Thus, we have a clear statutory authorization to commingle in one common fund moneys held

“as executor, administrator, guardian, personal or testamentary trustee, or committee” and a direction to account for all transactions in the common trust fund. Such accounting of the commingled funds may take place either in the Supreme Court or the Surrogate’s Court.

The close study of subdivision 10 in the light of its setting serves only to render its meaning more luminous. The unconditional grant of authority for filing an account in the Surrogate’s Court can only be interpreted as relating to any common trust fund which a corporate fiduciary is permitted to establish regardless of the source of the multiple funds which constitute the common fund. The fund is to be administered and managed as a separate legal entity wholly apart from the estates or funds who hold participations therein. Accounting is to be rendered of the aggregate fund as a separate legal entity. Jurisdiction is conferred upon the court to entertain the accounting of this new and distinct legal entity wholly apart from any jurisdiction that may have existed in respect of the different legal personalities who hold participating interests in the common trust fund.

In conferring jurisdiction over accountings of common trust funds the Legislature was perhaps guided by the fact that accountings in the estates whose funds were invested in the common funds are conducted either in the Supreme Court which possesses jurisdiction over all the estates or funds or in the Surrogate’s Court which has jurisdiction over decedent’s estates, guardians and testamentary trusts. The grant of jurisdiction which the Legislature made was under the circumstances not unnatural. There was no intent on the part of the Legislature, however, to dissolve the [fol. 163] common fund when once established into its component parts or to make jurisdiction attach only when jurisdiction theretofore existed over fiduciaries owning participating interests in the common fund.

In support of his argument that the Surrogate has no jurisdiction over a common trust fund accounting which includes *inter vivos* trusts as participating interests, the objecting special guardian contends that if the statutes are interpreted as granting such jurisdiction it will result in an enlargement by implication of the Surrogate’s jurisdiction so as to include *inter vivos* trusts. The same view is held by the learned Surrogate in *Matter of Security Trust Co. of Rochester* (supra). The grant of jurisdiction over



common trust funds is not at all the equivalent of a grant of jurisdiction over the participating estates, trusts or funds. The distinction was clearly pointed out by the coordinate branch of this court in *Matter of Bank of New York* (189 Misc., 459, 469), wherein it was held that in the common trust fund accounting the court had no power to construe the instruments which created the separate estates or trusts. The court pointed out that its "concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund" (p. 463). It said further:

"This accounting plan is designed to enable judicial scrutiny to be made under proper auspices of the management of the entity created by the statute and regulated by the Banking Board. It is not a substitute for an accounting in the underlying estates, [fol. 164] trusts or funds. When individual accountings in individual estates or funds are had, it will be appropriate to construe the underlying instruments creating such trusts or funds. Here the court should and does limit itself to ascertainment whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof."

With this reasoning this branch of the court has heretofore expressed its concurrence (*Matter of Continental Bank and Trust Co.*, 189 Misc., 795; 67 N. Y. S., 2d, 806, 807).

The court holds that jurisdiction to settle the account of the petitioner has been expressly conferred upon it by the Legislature. This objection of the special guardian is, therefore, overruled.

The second ground of challenge to the jurisdiction of the court is that the provisions of section 100-c relating to the notice to be given persons interested in the accounting proceeding do not meet the requirements of "due process of law" under the Fourteenth Amendment to the Constitution of the United States and under article 1, section 6, of the Constitution of the State of New York.

"The fundamental requisite of due process of law is the opportunity to be heard. \* \* \* And it is to this

end, of course, that summons or equivalent notice is employed" (*Grannis v. Ordean*, 234 U. S., 385, 394).

[fol. 165] No fixed form of notice is prescribed. Whether or not a form of notice meets constitutional requirements will depend upon the nature of the action, the character of the relief demanded and the circumstances involved. More exacting requirements must be satisfied if the action is *in personam* than if the action were *in rem* or *quasi in rem* (*Grannis v. Ordean*, supra, p. 392; Restatement of Judgments, sec. 6, comment g). However, the due process clause does not impose unattainable standards in any case. All that is required by the constitution is that the kind of notice and the method of giving it be reasonably adapted to the circumstances of the case, the nature of the proceedings and its subject matter (*Ballard v. Hunter*, 204 U. S. 241, 255; *North Laramie Land Co. v. Hoffman*, 268 U. S., 276, 283; *Security Sav. Bank v. California*, 263 U. S. 282; *American Land Co. v. Zeiss*, 219 U. S. 47, 66; *Campbell v. Evans*, 45 N. Y., 356, 359; Restatement of Judgments, sec. 6, sec. 32, comment f). The rule as generally enunciated is that the notice must be reasonably adequate to apprise those whose rights are affected of the proceeding against them and to afford them a reasonable opportunity to be heard (*City of New York v. Wright*, 243 N. Y., 80, 84; *Matter of Empire City Bank*, 18 N. Y., 199, 215).

It is not constitutionally indispensable in every case that notice of a proceeding must be brought to the personal attention of the parties. In some cases general publication or posting of notice is all that can reasonably be required (*Campbell v. Evans*, supra; *Matter of Empire City Bank*, supra; *Christianson v. King County*, 239 U. S., 356, 373; *Huling v. Kaw Valley R'y*, 130 U. S., 559; *North Laramie Land Co. v. Hoffman*, 268 U. S., 276; *Wick v. Chelan Electric Co.*, 280 U. S., 108, 111; *Lamb v. Connolly*, 122 N. Y., 531; *State of New York v. Gebhardt*, 151 Fed., 2d, 802). It has been established that a proceeding for the probate of a will is essentially *in rem* and that general publication or posting of notice is sufficient (*Everett v. Wing*, 103 Vt., 488, 156 A., 393, cert. denied 284 U. S., 690; *Goodrich v. Ferris*, 214 U. S. 71, 80, 81; *Donnell v. Goss*, 269 Mass., 214; 169 N. E., 150). It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of

the account of the fiduciary and the distribution of the assets, are proceedings *in rem* and general notice to interested parties by publication is sufficient under the constitution (*Goodrich v. Ferris*, supra; *Christianson v. King County*, supra, p. 373; *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc., 320).

Since direct personal notice is not required in every case, it remains only to determine whether the kind and manner of notice prescribed by the Legislature in this instance *was reasonably sufficient under the circumstances to apprise parties interested of the legal steps which were being taken and to enable them to avail themselves of the right to come in and be heard.*

The establishment of common trust funds was authorized by the Legislature for the purpose of making the services of corporate fiduciaries available to smaller estates and enabling the small estates or funds to obtain the advantage of diversification of risk and greater safety of principal that is normally obtainable only by the larger investors (*Matter of Bank of N. Y.*, 189 Misc., 459, 463; 2 Scott on Trusts, p. 1216; "Commingled Investment by Corporate [fol. 167] Fiduciaries in Pennsylvania," 87 U. Pa. Law Review, 577, 578). Various different types of common trust funds have been in use in other states (87 U. Pa. Law Review, supra, p. 580; Bogue, "Common Trust Fund Legislation," 5 Law & Contemporary Problems, 430, 431; "The Common Trust Fund Statute," 37 Col. L. Review, 1384, 1387), and of these our Legislature has validated a form and type best calculated to meet our needs. A common trust fund in this State is a legal entity distinct from the estates or funds whose moneys are invested (*Matter of Bank of N. Y.*, supra). The administration of the various estates and trusts continues separately under the regularly appointed fiduciaries. The accounting of the trustee of the common fund is not a substitute for an accounting in the underlying estates, trusts or funds (*Matter of Bank of N. Y.*, supra), and though it settles all questions respecting the management of the common fund, it provides no solution of the many varied problems peculiar to the underlying estates that necessarily arise in their separate administration.

The success of the common trust fund depends upon its use by large numbers of small estates and trusts. Its use by

small estates would not be expected to spread unless it could be carried on without substantial additional expense. Its attractiveness to beneficiaries of estates and trusts required that there be appropriate provisions in the statute governing self-dealing by the corporate fiduciary and assuring adequate supervision of the management of the fund. All of the various aspects of the problem received the careful attention of the Legislature and were dealt with in the extensive provisions of the statute. In addition to the legis- [fol. 168] lative directions contained in the statute itself, the Legislature conferred upon the Banking Board a broad power of supervision over and regulation of the management of the fund (chap. 687, L. 1937, sec. 3, now Banking Law, sec. 14, subdiv. 1-c). It directed that a copy of the rules and regulations of the Banking Board be furnished each county clerk, who under the constitution of this state is the Clerk of the Supreme Court (art. 6, sec. 21) and each Surrogate.

In respect of notice to beneficiaries, subdivision 9 of section 100-c of the Banking Law provides that at the time of making the first investment of any estate, trust or fund in a common trust fund the trust company must send a notice to each person of full age and sound mind whose name and address is known to it, and who is then known to claim to be entitled either to share in the income of the estate, trust or fund or to have such an interest in the principal that if the event upon which it is to be distributed had occurred at the time of the sending of such notice, he would share in such distribution. The notice must apprise the person that moneys of the estate, trust or fund have been invested in the common fund and that additional moneys may be invested without further notice. Subdivision 9 further directs that there "shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund." (Emphasis supplied.) The statute provides that the decree entered in any accounting proceeding respecting the common trust fund shall not be conclusive against any person to whom the trust company was required to send [fol. 169] such notice, but to whom such notice was not sent unless a notice shall have been sent to such person at least thirty days prior to the entry of the decree on accounting.



If notice is sent less than thirty days prior to the entry of such decree the person to whom the notice is sent shall have sixty days after the mailing of the notice to apply to vacate the decree as to him. If any such notice is sent after the institution of an accounting proceeding the notice must also state that the proceeding is pending and the name of the court in which it is pending. In respect of a notice sent after the entry of a decree on accounting there must also be stated the fact that such decree has been entered and the date and place of such entry.

When the notice which the trust company is required to send to known beneficiaries is received, the beneficiary is apprised of the fact that the statute makes it mandatory upon the trustee to file regular accountings and to proceed with the judicial settlement of those accounts. He is advised that the first account must be filed not less than twelve nor more than fifteen months after the date of establishment of the common trust fund and that accounts must be filed triennially thereafter. He is further told that the judicial settlement of the account must take place either in the Supreme Court in the county in which the trust company maintains its principal place of business or in the Surrogate's Court of that county. The beneficiary is also informed that he has a right to appear in any accounting proceeding and that if he fails to do so, a special guardian will be appointed to represent him.

The rules and regulations of the Banking Board also contain provisions for acquainting the beneficiaries with information respecting the common trust fund. At least once each year the trust company must cause an audit of the common trust fund to be made. The report of the audit must contain data set forth in these rules. The trust company is required to send a copy of the latest report of the audit to each person to whom a regular periodic accounting of the estates or funds ordinarily would be rendered or shall advise each person annually that the report is available and that a copy will be furnished upon request (Regulations of Banking Board, Art. X, 3). The regulations further provide that all accounting records, registers, statements and audits pertaining to the common trust fund for the period subsequent to that covered by the last judicial account shall be subject to inspection on the three business days next succeeding any valuation date by any adult and competent person, by the guardian of an infant or by the



committee of an incompetent when it appears that the adult person, the infant or incompetent is a person interested in a participating estate, trust or fund (Art. X, 6).

The regulations of the Banking Board also provide that no trust company shall establish a common trust fund unless it shall have submitted a plan of operation to the Banking Board and shall have received the written permission of the Banking Board to do so (Art. I, 3). The plan of operation of the fund accounted for provides that there shall be appended to the notice required to be sent interested persons under the terms of subdivision 9 of section 100-c of the Banking Law a copy of the provisions of subdivisions 9, 10, 11, 12, 13, 14 and 15 of section 100-c (section [fol. 171] 2.4). It provides that a copy of the plan must be kept on file in the principal office of the trust company and shall be available for inspection during banking hours by any persons interested in any participating trust and that a copy of the Plan shall be given on reasonable request to each person interested in any participating trust (sec. 11.1). The plan of operation contains provisions relating to right of inspection similar to those contained in the regulations of the banking board, but making the provisions expressly applicable to this common trust fund by giving the location of the office where the Plan is to be kept and where the various records may be inspected (id.).

*These preliminary notices and rights of inspection sufficiently inform each beneficiary that an investment has been made in the common trust fund, the manner in which the fund is to be managed, and the nature and extent of State administrative and judicial supervision. He is given sufficient information so that he can keep himself informed of the various stages of the administration of a common fund and of the periodic accountings which must be judicially settled. The statutory provisions appended to the notice tell each beneficiary that the petition in each accounting proceeding shall contain a list of all participating estates or trusts and that it need describe them by stating the name of the decedent in the case of a decedent's estate or testamentary trust, the name of the infant or incompetent in the case of such estates or the name of the donor or grantor of a living trust and the date of the instrument. If a will sets [fol. 172] up more than one testamentary trust there must be given the number of the paragraph creating the participating trust or other appropriate identification.*

In respect of the more specific notice to be given in each separate accounting proceeding, subdivision 12 of section 100-c of the Banking Law reads:

"After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each [fol. 173] lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have

been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as ~~such guardian and attorney.~~"

The fund now accounted for has 113 participating estates or trusts in which there are some 315 persons known to be interested. This fund has not yet reached the maximum [fol. 174] amount compatible with efficient and orderly management. The number of persons who will be interested when such limit is reached cannot of course, now be estimated. It is apparent that in any accounting of a common trust fund personal service of citation on all persons would entail considerable expense. With frequent accounting proceedings in each common fund this expense would, when added to other necessary charges, impose financial burdens so large as to overcome the advantages of the common fund. The objecting special guardian does not contend that personal service on all interested persons should be required. Even service by mail upon *all* parties interested would involve a disproportionate expense, for the trustee would then be required to make extensive investigations prior to each accounting proceeding to complete the record of the births, deaths and other occurrences which might increase, decrease or otherwise change the groups of interested persons. In an accounting proceeding in a single trust it frequently happens that the trustee is required to make investigation respecting the proper parties not only immediately prior to initiation of the proceeding but also during the pendency of the proceedings. Not infrequently one or more parties die and their personal representatives must be substituted; persons newly born must be brought in by supplemental citation. Where there are a large number of parties who are not members of a closely knit family circle and where the changing circumstances require a construction of the instrument in order to determine who are necessary parties, the investigation by counsel for the trustees necessarily [fol. 175] increases the expenses of the proceeding. In view of this experience in ordinary accounting proceedings it is not urged—and in any event it could not reasonably be urged—that the constitution requires that direct notice of

the accounting be brought to the attention of every party interested in the underlying estates and trusts.

The special guardian, argues, however, that the minimum that should be required is that notice by mail be given to all known parties of the classes specified in subdivision 9 of section 100-c. The question before the court, however, is not whether the Legislature should as a matter of grace have required continuing notice of the steps to be given to known parties but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the Federal and State Constitutions.

In *Matter of Empire City Bank* (18 N. Y., 199, 216), the court said:

“If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. A case may be supposed where the reason for departing from the [fol. 176] more safe rule of the common law is so plainly frivolous, or the provision for notice is so clearly colorable and illusory, that the courts would be called upon to declare the enactment a fraud upon the constitution. \* \* \* In the case under consideration, there was at least a plausible reason for not requiring actual notice. The shareholders in banking associations are frequently very numerous, and although the books ought to disclose their names, such is not always the case. Everyone in any way connected with a bank would be likely to hear of a fact so notorious as that it had stopped payment, and that its affairs had passed into the hands of a receiver. If, then, all of the parties sought to be charged who reside in the same town are actually notified, and public notice is given in several public journals in regard to all others, the parties interested will be likely to hear of the proceeding. The probability of actual notice would be equally great in respect to the creditors; as the holders of the liabilities of a



bank are usually among the most likely to know that it has failed. I conclude, therefore, that the proceeding does not lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given to all the parties to be charged as stockholders."

In *American Land Co. v. Zeiss* (219 U. S., 47, 66) the United States Supreme Court said:

"On the contrary, we think the statute manifests the [fol. 177] careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. to argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

*Security Savings Bank v. California* (263 U. S. 282) involved a suit brought by the State to have transferred to it certain deposits in the bank which had been unclaimed for more than twenty years. It was argued the notice of the proceeding was insufficient because service was made by publication and it had not been shown in the proceeding by affidavit that personal service was impossible or impractical. The court pointed out that although such an affidavit is a common requirement in statutes providing for service by publication it is not constitutionally indispensable. Mr. Justice Brandeis said:

"The reason for requiring the affidavit is that, ordinarily, personal service would be more likely to acquaint a defendant with the pendency of the suit. But here the general facts which underlie the legislation established the futility of such a



requirement. \* \* \* The legislature evidently assumed that it would be impossible to serve such depositors personally. The supreme court of the state held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown. \* \* \* We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (pp. 288-289).

The court is of the view that the kind and manner of notice prescribed by the Legislature in this case were not, under the circumstances, so unreasonable as to amount to a denial of due process of law. In respect of this new legal entity created by the Legislature and the administration of the common fund by it, the beneficiaries of the separate estates and trusts have been given ~~not only~~ notice of the investment but in addition a notice sufficient to enable them to keep constant check on the progress of the administration prior to accounting proceedings, during an accounting proceeding and after the accounting proceeding. Rights of inspection of records are granted to them which are not available to beneficiaries of ordinary trusts. The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and [fol. 179] competent public officials. There is full opportunity for beneficiaries not only to join in the accounting proceeding as a party but to keep in constant touch with the management of the fund. The statute provides for notice sufficient to apprise the beneficiaries of their rights and to enable those interested a full and complete opportunity to exercise their rights.

The objections of the special guardian representing income beneficiaries are accordingly overruled. An intermediate decree may be submitted on notice or consent if the parties so desire. When the special guardians have filed their final reports the court will dispose of the questions raised by the petitioner and any other issues properly raised herein.

Proceed accordingly.

[fol. 180] IN NEW YORK SUPREME COURT, APPELLATE DIVISION  
—FIRST DEPARTMENT

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

KENNETH J. MULLANE, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for [fol. 181] each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents

STIPULATION PERMITTING ADDITIONS TO RECORD IN APPELLATE  
DIVISION—May 13, 1948

It is hereby stipulated and agreed by and between the undersigned, attorneys for the parties hereto, that the following:

1. Regulations of the New York State Banking Board relating to the establishment and operation of Common Trust Funds pursuant to Section 100-c of the Banking

Law of the State of New York, as amended to September 12, 1945;

2. Amendment to said Regulations effective December 1, 1947;

3. Plan of Operation of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, dated December 20, 1945; and

4. Specimen form of Notice, pursuant to subdivision 9 of said Section 100-c and to said Regulations and "Plan of Operation", of first investment by a participating estate, trust or fund in said Common Trust Fund;

may be submitted as exhibits on the appeal in the above-entitled proceeding which was argued before this Court on [fol. 182] May 11, 1948 and that the record on appeal may be amended by adding such papers thereto.

Dated: New York, New York, May 13, 1948.

Kenneth J. Mullane, Appellant, Special Guardian, etc., appearing specially. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Respondent, Special Guardian, etc.

[fol. 183] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION SETTLING CASE—January 21, 1948

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated, New York, January 21st, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

**IN THE SURROGATE'S COURT FOR NEW YORK COUNTY****ORDER SETTLING CASE—January 28, 1948**

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated, New York, January 28, 1948.

William T. Collins, Surrogate.

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**[fol. 184] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY****STIPULATION WAIVING CERTIFICATION—January 21, 1948**

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the notice of appeal, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of New York and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated, New York, January 21st, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fols. 185-186] IN THE SURROGATE'S COURT OF NEW YORK COUNTY

ORDER FILING RECORD IN APPELLATE DIVISION—January 28, 1948

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated, New York, January 28th, 1948.

William T. Collins, Surrogate.

[fol. 187] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF AFFIRMANCE—July 7, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, in a voluntary accounting proceeding, made and entered in said Surrogate's Court on the 26th day of November, 1947, which inter-



mediate decree of said Surrogate's Court overruled two [fol. 188] objections of the appellant addressed to the jurisdiction of the said Surrogate's Court, and the said appellant appeals from each and every part of the aforesaid order of said Appellate Division, as well as from the whole thereof.

Dated: New York, N. Y., July 7th, 1948.

Kenneth J. Mullane, Esq., Special Guardian and Attorney<sup>a</sup> appearing specially, Office & Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York. Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y. James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 189] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM FINAL DECREE  
—August 20, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the final decree of voluntary accounting entered in the above

entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said final decree as adjudges the following:

"Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

"Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

"Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States,"

[fol. 191] And upon said appeal the appellant intends to bring up for review the interlocutory decree and every part thereof made in this proceeding, and entered in the office of the Clerk of the Surrogate's Court of New York County, on or about November 26th, 1947, the intermediate order of the Appellate Division, First Department, dated June 21st, 1948, affirming said interlocutory decree, and the order

on remittitur entered in this proceeding in the office of the Clerk of the said Surrogate's Court on August 12th, 1948.

Dated: New York, N. Y., August 20th, 1948.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office and Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 192] IN SURROGATE'S COURT FOR NEW YORK COUNTY  
NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER ON REMITTITUR—August 20, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the order on remittitur entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said order on remittitur as adjudges that the

Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken herein under Section 100-c of the Bank-  
[fol. 193] ing Law constitutes due process of law.

Dated: New York, N. Y., August 20th, 1948.

Yours, Etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office & Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 194] IN THE APPELLATE DIVISION OF THE SUPREME COURT  
OF NEW YORK

ORDER OF AFFIRMANCE—June 21, 1948

Present: Hon. Edward J. Glennon, Justice, Presiding;  
Albert Cohn, Joseph M. Callahan, John Van Voorhis, Ber-  
nard L. Shientag, Justices.

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In the Matter of the Judicial Settlement of the Account  
of Proceedings of CENTRAL HANOVER BANK AND TRUST  
COMPANY, as Trustee of Discretionary Common Trust  
Fund No. 1 of Central Hanover Bank and Trust Com-  
pany established under Plan of Operation dated De-  
cember 20, 1945

KENNETH J. MULLANE, as Special Guardian and Attorney  
for each infant not appearing by his General Guardian,  
each lunatic, idiot, habitual drunkard and other incom-  
petents not appearing by a Committee, and each other  
party known and unknown, who has not otherwise ap-  
peared in this proceeding, who had, has, or may here-  
after have any interest in the income of the above-named  
[fol. 195] Discretionary Common Trust Fund No. 1,  
appearing specially, Appellant;

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee  
of Discretionary Common Trust Fund No. 1 of Central  
Hanover Bank and Trust Company established under  
Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for  
each infant not appearing by his General Guardian, each  
lunatic, idiot, habitual drunkard and other incompetents  
not appearing by a Committee, and each other party  
known and unknown, who has not otherwise appeared in  
this proceeding, who had, has, or may hereafter have  
any interest in the principal or capital of the above-  
named Discretionary Common Trust Fund No. 1, Re-  
spondents

An appeal having been taken to this court by Kenneth  
J. Mullane, as Special Guardian, etc., appearing specially  
from the intermediate decree of the Surrogate's Court of



the County of New York, entered in the Surrogate's Court on the 26th day of November, 1947,

And said appeal having been argued by Mr. Kenneth J. Mullane, Special Guardian and attorney for certain persons interested in income, appearing specially, by Mr. Albert B. Maginnes of counsel for the respondent trustee, and by Mr. James N. Vaughan, Special Guardian and attorney representing infants, etc. having an interest in trust [fol. 196] principal; and due deliberation having been had thereon,

It is ordered and adjudged that the decree so appealed from be and the same is hereby affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund. (One of the Justices dissents.)

Enter.

George T. Campbell, Clerk.

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IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. William T. Collins, Surrogate.

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

ORDER ON REMITTITUR APPEALED FROM—August 11, 1948

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore [fol. 197] filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents

not appearing by a Committee, and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceedings for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as afore-[fol. 198] said, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court,

Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustees as aforesaid, it is

—Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered June 21, 1948 be, and the same hereby is, made the order of this Court; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said Kenneth J. Mul-lane, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Six hundred ninety-six and 74/100 Dollars (\$696.74) as and for his printing disbursements as taxed herein; and it is further

[fol. 199] Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Eighty-one and 22/100 Dollars (\$81.22) as and for his costs and disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to itself out of the principal of said Fund the sum of Three hundred forty-nine and 67/100 Dollars (\$349.67) as and for its costs and disbursements as taxed herein; and it is further

Ordered that all questions relating to the fees and allow-ances to which any of the parties hereto, or their attorneys, may be entitled, by reason of their services either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, rendered up to and including the date of this order be, and they hereby are, reserved for such disposition as may be made of them in the final decree on accounting to be entered herein.

William T. Collins, Surrogate.

Entered 8/12/48, Office of Clerk of Surrogate's Court, New York County.

Surrogate's Court, N. Y. County, Filed Aug. 12, 1948.

[fol. 200] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

Present—Honorable William T. Collins, Surrogate

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

FINAL DECREE ON VOLUNTARY ACCOUNTING APPEALED FROM—  
August 12, 1948

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946, established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that [fol. 201] the said first account of proceedings be judicially settled and allowed, that a determination be had as to the proper allocation of a certain dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, as between the principal and income accounts of said Discretionary Common Trust Fund and that the compensation of Messrs. Rathbone, Perry, Kelley & Drye for legal services, rendered herein as attorneys for petitioner, in the sum of \$2,000, plus proper disbursements, be fixed and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New York addressed generally without naming them to the persons interested in said Discretionary Common Trust Fund No. 1



of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described Trusts and Estates participants therein

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the Will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

[fol. 202] Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

[fol. 203] Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the Will of Amelia Dubuch, deceased, for Raymond A. Dubuch



(Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

[fol. 204] Trust under Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

[fol. 205] Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lehman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

[fol. 206] Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

[fol. 207] Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated [fol. 208] May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

[fol. 209] Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

[fol. 210] Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weik.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

[fol. 211]- Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGrafenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igerscheiner.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.



[fol. 212] Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement [fol. 213] dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

[fol. 214] Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereof upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee ~~and to appear~~ for each other party, known or unknown, who did not otherwise appear in this proceeding who had, has or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund [fol. 215] No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not ap-

pearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee and to appear for each other party, known or unknown, who did not otherwise appear in this proceeding, who had, has, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Banking Law of the State of New York filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled in the common trust fund moneys from inter vivos trust with moneys from testamentary trusts and since this Court had no jurisdiction over [fol. 216] inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceedings and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as

such Special Guardian and Attorney as aforesaid, and this Court having entered its Intermediate Decree of Voluntary Accounting dated the 26th day of November, 1947, wherein and whereby it was ordered, adjudged and decreed that the objections of Kenneth J. Mullane, as such Special Guardian and Attorney, were dismissed and that this Court had jurisdiction to settle petitioner's account of its transactions as Trustee aforesaid and that all of the proceedings taken under Section 100-c of the Banking Law constituted due [fol. 217] process of law, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appealed from said decree dated November 26, 1947, to the Appellate Division of the Supreme Court, First Judicial Department, and the said appeal having been argued before said Court and the said Court having rendered its decision thereon (one of the Justices dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that the said decree of this Court be affirmed with costs to the respondents and printing expenses to the appellant payable out of the fund, and a certified copy of the said order of the said Appellate Division of the Supreme Court, together with the printed record of the papers upon which said appeal was heard, having been duly filed in this Court, and this Court having entered its order dated the 11th day of August, 1948, wherein and whereby it ordered that the said order of the said Appellate Division of the Supreme Court, granted and entered June 21, 1948, be made the order of this Court and that the parties to said appeal to the said Appellate Division of the Supreme Court be paid by Central Hanover Bank and Trust Company, as Trustee as aforesaid, their costs and disbursements as ordered by the said order of the said Appellate Division of the Supreme Court, and Central Hanover Bank and Trust Company, as Trustee as aforesaid, and the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having entered into a stipulation entered the 10th day of August, 1948, wherein and whereby it was agreed that Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, would not, upon the filing of his report herein passing upon the said account of proceedings, waive the objections he, appearing specially, had heretofore taken herein in his said answer and objections dated May 26, 1947, to the jurisdiction of this Court, and James N. Vaughan, as



Special Guardian and Attorney as aforesaid, having duly filed his report, verified the 30th day of July, 1948, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his report dated the 11th day of August, 1948, both of which reports approve said account of proceedings concur in the opinion that said dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, constitutes income and not principal of said Discretionary Common Trust Fund and should be disposed of accordingly and approve the fixation and allowance of the fees of said attorneys for the petitioner and no objections having been filed with respect to said account and the time within which any answer or motion with respect to said petition or objections with respect to said account could be made having fully expired, and the petitioner having appeared on the return date of such citation and having rendered its said account under oath, and said account having been filed and the said matter having been adjourned to this day, and the said Surrogate, after having examined the said account, now here finds the state and the condition of the same to be as stated in the following summary statement [fol. 219] thereof, made by the Surrogate as judicially settled and adjusted by him to be recorded with and to be taken to be a part of this decree, to wit:

**SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE OF DISCRETIONARY COMMON TRUST FUND NO. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY ESTABLISHED UNDER PLAN OF OPERATION DATED DECEMBER 20, 1945, COVERING THE PERIOD FROM JANUARY 31, 1946 TO JANUARY 30, 1947.**

**Principal Account**

**Charges:**

Amount shown by Schedule A (Funds Received from Participants) .....	\$2,926,328.07	
Amount shown by Schedule A-1 (Increases on Principal) .....	109.18	
<b>Total Principal Charges</b> .....		<b>\$2,926,437.25</b>

**Credits:**

Amount shown by Schedule B (Decreases on Principal) .....	\$ 466.05	
Amount shown by Schedule C (Principal Administration Expenses Paid) .....	0	
Amount shown by Schedule D (Units Redeemed by Participants) .....	52,418.81	52,884.86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947) .....		<b>\$2,873,552.39</b>



[fol. 220]

## Income Account

## Charges:

Amount shown by Schedule H (Total Income Received).....	\$	53,313.33
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## Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants).....	\$	58,103.72
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Amount shown by Schedule I-2 (Income Administration Expenses Paid).....	-0-	58,103.72
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Amount shown by Schedule J (Income Cash Remaining on Hand, January 30, 1947).....	O. D.	\$ 4,790.39
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## Combined Accounts

Principal Remaining on Hand.....		\$2,873.552 39
Income Remaining on Hand.....	O. D.	4,790.39

Total on Hand, January 30, 1947.....		<u>\$2,868.762 00</u>
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and it appearing to the satisfaction of the said Surrogate that the petitioner has fully accounted for all moneys and property of said trust which came or should have come into its possession, that said account is in all respects complete, correct and in order and that the acts and proceedings of petitioner embraced in said account and in this proceeding have been in all respects in compliance with the requirements of law, and said account of proceedings having been adjusted by said Surrogate and a summary statement thereof having been made, as above set forth and recorded, it is hereby

[fol. 221] Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Com-

pany as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States, and it is further.

Ordered, adjudged and decreed that said account of proceedings be, and the same hereby is, judicially settled and [fol. 222] allowed, and the acts and proceedings of petitioner as embraced in said account and in this proceeding be, and they hereby are, in all respects approved; and it is further

Ordered, adjudged and decreed that said dividend on the stock of the American Gas & Electric Company, payable in said shares of Atlantic City Electric Company, is not a stock dividend within the meaning of the Plan of Operation of said Discretionary Common Trust Fund and is in effect a distribution in lieu of current cash earnings and, therefore, constitutes income and not principal of said Discretionary Common Trust Fund and shall be disposed of accordingly; and

James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 10th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth his services, as Special Guardian and attorney as aforesaid, in this Court only, and Albert B. Maginnes, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth the services in this Court only of Rathbone, Perry, Kelley & Drye as attorneys for the petitioner herein, and it appearing that Kenneth J. Mullane as Special Guardian and Attorney as [fol. 223] aforesaid, is contemplating taking an appeal from this decree to the Court of Appeals of this State, it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to James N. Vaughan, Esq., the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Kenneth J. Mullane, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Messrs. Rathbone, Perry, Kelley & Drye the sum of Two thousand dollars (\$2,000) as and for their fee for services in this Court only as attorneys for the petitioner herein as aforesaid, which sums are hereby fixed and allowed as and for their fee and disbursements herein; and it is further

Ordered, adjudged and decreed that all questions relating to the fees and allowances to which any of the parties [fol. 224] hereto, or their attorneys, may be entitled, by reason of their services heretofore rendered in connection with the appeal heretofore taken to the Appellate Division of the Supreme Court, First Judicial Department, by Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, be, and they hereby are, reserved for a supplemental decree to be entered herein after the final determination of such appeals as may be taken and prosecuted herein by any of the parties hereto; and it is further

Ordered, adjudged and decreed that upon the making of the payments herein directed to be made, the petitioner be, and it hereby is, fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree, provided, however, that petitioner shall retain and administer in accordance with the requirements of law the balance

of principal and income remaining in its hands after making the payments herein directed to be made:

William T. Collins, Surrogate.

Entered 8/12/48. Office of Clerk of Surrogate's Ct., New York County.

Surrogate's Court, N. Y. County. Filed Aug. 12, 1948.

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[fol. 225] IN SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION SAVING RIGHTS OF APPELLANT UPON APPEAL TO  
COURT OF APPEALS—August 10, 1948

[Title omitted]

It is hereby stipulated, consented and agreed that participation by Kenneth J. Mullane, Esq., as special guardian and attorney for certain persons interested in income, in any further proceedings herein in the Surrogate's Court shall not prejudice, impair or affect in any manner or to any extent his right to appeal from any determination heretofore or hereafter made respecting the two certain objections which he heretofore, appearing specially, made to the jurisdiction of said court or his right to a hearing and determination on the merits respecting said objections on any such appeal.

Dated: New York, N. Y., August 10, 1948.

Kenneth J. Mullane, Special Guardian and Attorney  
for certain persons interested in income, appearing  
specially. James N. Vaughan, Special Guardian  
and Attorney for certain persons interested in principal. Rathbone, Perry, Kelley & Drye, Attorneys  
for Petitioner.

[fol. 226] IN SURROGATE'S COURT FOR COUNTY OF NEW YORK  
 REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN  
 PERSONS INTERESTED IN INCOME—August 11, 1948

[Title omitted]

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard, or other incompetent not appearing by a Committee, and for each other party known or unknown who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially; do respectfully report:

#### Nature of Proceeding

This proceeding was commenced by Central Hanover Bank and Trust Company, trustee of Discretionary Common Trust Fund No. 1, established by it under a Plan of Operation dated December 20th, 1945, for the judicial settlement of its first intermediate account as such trustee and for a de-[fol. 227] termination of certain matters with respect to its administration of the fund. This common trust fund was established pursuant to Section 100-C of the Banking Law of the State of New York and the Regulations of the Banking Board of the State of New York with respect thereto. The account covers the first year of operation of the fund, to wit, from January 31st, 1946 to January 30th, 1947.

#### Jurisdiction of This Court

The petition and account herein were filed in the office of the Surrogate of New York County on March 28th, 1947 in compliance with Subdivision 10 of Section 100-c of the Banking Law which requires that not less than twelve months nor more than fifteen months after the date on which a common trust fund is first established, the trust company maintaining it shall file an account of its proceedings in respect thereto and a petition for the judicial settlement thereof either in the office of the Clerk of the Supreme Court or in the office of the Surrogate in the County in which the trust



company maintains its principal office. Upon the filing of the petition and account a citation was issued addressed to the various trusts having an interest in the fund. Pursuant to the provisions of the statute the citation did not name any of the persons interested in the separate trusts. The return day of the citation was May 2nd, 1947. An order of publication of the citation was made and publication effected pursuant thereto. Neither personal service nor mailing of the citation was required by the statute and none was made. I [fol. 228] have examined the proof of service of the citation filed herein and find that the statute and order of publication were complied with.

By Preliminary Report, dated May 26th, 1947, I raised two objections to the jurisdiction of this Court which were overruled by an intermediate decree of this Court, dated November 26th, 1947. Thereafter, I appealed from said decree to the Appellate Division which affirmed said intermediate decree (one Justice dissenting) by an order dated June 21st, 1948. Subsequently, I appealed by Notice of Appeal dated July 7th, 1948 from the said order of the Appellate Division to the Court of Appeals which appeal is now pending. Accordingly I specifically reserve all my rights relating to any such appeal and neither the service and filing of this present Report nor anything contained herein shall be construed as a waiver of any of such rights.

#### Persons Represented and Nature of Their Interests

My appointment was made pursuant to Subdivision 12 of Section 100-c of the Banking Law which requires that upon the filing of a petition for the judicial settlement of the account of the trustee of a common trust fund, the Court shall appoint two persons, one to appear as Special Guardian and Attorney for certain parties who may be interested in the income of the common trust fund and the other to appear for the parties having an interest in the principal or capital of the trust fund. By order of Mr. Surrogate James A. Delechanty made on March 31, 1947 I was appointed Special Guardian and Attorney for the persons having an [fol. 229] interest in the income of the fund.

My examination of the files of this Court with respect to this proceeding indicates that there have been no appearances herein except by counsel for the accounting trustee, by James N. Vaughan, Esq. similarly appointed as Special

Guardian and Attorney for persons having an interest in the principal of the fund and by the undersigned Special Guardian and Attorney. I therefore represent all persons, either infants or adults, competent or otherwise, who have any interest in the income of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company accounted for in this proceeding. The interest of these persons arises from their interest as income beneficiaries in the different trusts and funds which have participations in the common trust fund.

### Operation of the Fund

The Plan of Operation of the common trust fund is dated December 20th, 1945. It was established pursuant to Section 100-c of the Banking Law and the Regulations of the Banking Board.

Pursuant to the Plan initial units were issued by Central Hanover as trustee thereof as of January 31, 1946. 717,621 units were issued at that time. Additional units were issued monthly thereafter—the last issuance reported in this account being as of December 31, 1946. A total of 2,962,276 were issued—55,396 of which were withdrawn during the period accounted for.

The Plan of Operation provides that the fund is established, operated and maintained for investment of moneys [fol. 230] contributed thereto from funds of which Central Hanover is either the sole fiduciary or a co-fiduciary with others.

I have not examined the instruments under the terms of which investment was made in the participating units of the common trust fund, in view of the ruling in Matter of Hoaglund.

### Scope of My Examination

In the course of my duties as Special Guardian and Attorney I have studied the provisions of the Banking Law applicable to common trust funds and the regulations issued by the Banking Board from time to time with respect thereto. I have examined the petition, account, affidavit of legal services and other papers on file in this Court on this proceeding.

I have attended at the office of the accounting trustee and conferred with the assistant vice-president in charge of the administration of the fund. I have there examined various

records and documents including minutes of the Trust Investment Committee.

I have examined a copy of the audit and condition of this fund, prepared for the Board of Trustees of Central Hanover.

I have examined forms of notice of first investments mailed to beneficiaries pursuant to Subdivision 9 of Section 100-c of the Banking Law and Section 2.4 of Article II of the Plan of Operation, memoranda placed in the records of the individual funds reporting the investment by acquisition of stated units of participation in the Discretionary Common Trust Fund, statements of review and recommendation of the trust administration and trust investment departments with respect to investment of units in the common [fol. 231] trust fund for a particular trust, notices of intention to invest in the common trust fund, opinions of counsel as to the eligibility of individual trusts to participate in the fund and other records of the trustee with respect to this Discretionary Common Trust Fund.

I have examined the certificate of the Superintendent of Banks filed in this proceeding.

It is my opinion that all of the records of the trustee herein are kept in compliance with the requirements of the Plan of Operation and the Regulations of the Banking Board.

#### Notice With Respect to Issuance of Units

Article VI of the Plan of Operation specifies that no participation shall be admitted to or withdrawn from the common fund except as of a valuation date and that at least five days prior notice must be given of intention to participate in or withdraw from the fund. From my examination of the records of the trustee, particularly the minutes of the Trust Investment Committee, and the files of the individual participant funds, I believe that the requirements as to these notices were properly carried out.

I further ascertained that pursuant to Section 2.4 of Article II of the Plan of Operation and Subdivision 9 of Section 100-c of the Banking Law that when the first investments, from a particular fund were made in the Discretionary Common Trust Fund notices were given to the classes of interested persons prescribed by the statute. At the same time copies of certain provisions of Section 100-c of the Banking Law were forwarded to these beneficiaries.

### [fol. 232] Limitations on Amounts of Participations

Subdivision I of Section 100-c of the Banking Law and Section 4 of Article II of the Plan of Operation prescribe certain limitations on the participation of the separate funds in the common fund. For instance, no trust may participate to the extent of more than 10% of the value of the assets of the common fund or the sum of \$50,000 whichever is the lesser. There are additional limitations when more than one trust is created by the same settlor.

In the common fund a number of participations are held by different trusts created by the same settlor or under the same will. For instance, the account shows that nine trusts provided for under the last will and testament of Adolph L. Gondran participate in this fund. However, it appears that on the basis of the "presently payable" test which has been approved in Matter of Bank of New York no one fund established thereby has in excess of the limitation on the amount of participations permitted. As is shown by its questionnaire with respect to the eligibility to participate by any particular trust, the trustee endeavors to take all reasonable precautions to ascertain that no participation might exceed the limitations.

### Schedules of the Account

#### Investment and reinvestment in securities

Schedules A-1, and E of the account herein set forth the details of purchase of securities constituting principal of the trust and sales redemptions and other dispositions of [fol. 233] certain of them and the gain or loss resulting therefrom. The securities purchased for the fund were acquired between February 1, 1946 and January 23, 1947, the total investment in that period being \$2,923,441.44. The majority of the investments originally purchased were retained throughout the period accounted for.

Increases on sales and redemptions during the period accounted for are shown in Schedule A-1 of the account and total \$109.18. Decreases realized during the period amounted to \$466.05.

#### Income Received and Disbursed

Schedule H of the account sets forth the income received during the period accounted for and Schedule I-1 shows the



payments from income to the participating trusts. Schedule J shows the balance of income on hand as of January 30, 1947, the last date covered by the account.

Income received is reported on a cash basis. The distribution of income has been computed on an accrual basis pursuant to Article VII, Section 7.2 of the Plan. Thus although the total income received in the period from January 31, 1946 to January 30, 1947, less income accrued at time of purchase was \$53,313.33 (Schedule H), the income distributed to January 30, 1947 was \$58,103.72. Income accrued but not received on January 30, 1947 was \$10,393.59.

### Periodic Valuations of Principal and Income

Schedule A of the account sets forth a schedule of the participations held with valuations as of the opening of business [fol. 234] on the different valuation dates, to wit, January 31st, 1946 and approximately monthly thereafter. This method of valuation is prescribed in Article 5 of the Regulations of the Banking Board and Article V of the Plan of Operations;

Income was also valued pursuant to the regulations and the Plan. The income was valued on an accrual basis thus enabling the Trust Investment Committee to ascertain the amount of income distributable as of a valuation date, even though it had not been received in full. This caused a periodic income overdraft. These distributions of income were made directly after the income valuations were determined when it was ascertained how much per unit was to be distributed. Included in accrued income was bond interest and dividends declared on stock and payable to holders of record at the time of the valuation date.

As of January 30, 1947 the valuation of securities constituting principal of the fund was \$2,734,724.07. Principal cash as of that date was \$40,350.17, making a total principal value, as shown in Schedule K-1 of \$2,775,074.24. Thus the actual value of the fund as of January 30, 1947 consisting of cash as of that date and securities valued as of that date was \$2,775,074.24. Schedule F of the account shows the total value of the property constituting principal and remaining in the hands of the trustee as of January 30, 1947 was \$2,873,552.39. However, this difference from the foregoing is due to the fact that in Schedule F securities are carried



at their cost or inventory value rather than their market value as of January 30, 1947.

[fol. 235] **Audit of the Discretionary Common Trust Fund**

Article 10 of the Regulations of the Banking Board requires that an audit of the common-trust fund be made once during each twelve month period by auditors responsible only to the Board of Trustees and that audit shall contain a list of investment valuations, statement of purchases and other information. This section requires that the trustee shall send a copy of this audit annually to each person to whom a regular periodic accounting of the participating fund ordinarily would be rendered or shall send advice to such persons that the report is available and that a copy will be furnished without charge upon request. Article VIII of the Plan of Operation provides for this audit and for the furnishing of a copy thereof to income beneficiaries of each of the participating trusts, to co-fiduciaries and to certain other persons. I have obtained a copy of the audit made to the Board of Trustees by Price, Waterhouse & Company, accountants and auditors, for the period down to January 31, 1947. This report has been prepared in pamphlet form with a letter to the beneficiaries from the President of Central Hanover. I have been informed that a copy is being mailed without charge to all of the income beneficiaries and to other persons required under the provisions of the Plan of Operation and the Regulations of the Banking Board.

[fol. 236] **Stock Dividends**

The petition herein contains the following allegations:

"Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate

which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received."

Upon information and belief derived from the Attorneys for the petitioner, the earnings on said common stock during [fol. 237] the period from 1940 to 1946 inclusive always exceeded \$2.00 per annum whereas the dividend paid on said stock never exceeded \$2.00 per annum except in the year 1946 when the dividend was \$2.15 per annum and the earnings for that year were \$3.80. On information and belief the proposed stock dividend is not a true stock dividend within the meaning of the Plan of Operation but is a distribution out of current earnings in lieu of cash; accordingly, pursuant to Article VII, Section 7.1, paragraphs two and four of the Plan of Operation the said dividend should be wholly allocated to income.

#### Conclusion

Apart from my objections addressed to the jurisdiction of the Court which are set forth in my Preliminary Report dated May 26th, 1947 and which I reiterate and hereby preserve, I have no objection to the Account herein.

Dated New York, August 11, 1948.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

(Verified August 11, 1948.)

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[fol. 238] IN SURROGATE'S COURT FOR NEW YORK COUNTY

[Title omitted]

REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN PERSONS INTERESTED IN PRINCIPAL—July 30, 1948

In March 1947 I was appointed Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual

drunkard and other incompetents not appearing by a committee and for each party known and unknown not otherwise appearing in this proceeding who has or may hereafter have any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq., was appointed to represent similarly described persons who have or may hereafter have an interest in income account of said Common Trust Fund.

Mr. Mullane filed a preliminary report verified May 26, 1947 objecting to the jurisdiction of this Court to grant the petition. He alleged that the law pursuant to which the Common Trust Fund was created and under which it is administered was constitutionally unsound. He also objected to what he described as the commingling in the Common [fol. 239] Trust Fund of moneys from *inter vivos* trusts and moneys from testamentary trusts on the ground that this Court lacked jurisdiction over *inter vivos* trusts and hence could not make a valid decree in the present proceeding.

As Special Guardian for various persons interested in principal account I filed a preliminary report verified June 2, 1947 requesting that the objections of Mr. Mullane be dismissed as insufficient in law.

Such proceedings were thereafter had as resulted in a hearing before Mr. Surrogate Collins. The Surrogate in an opinion appearing in the New York Law Journal November 7, 1947, overruled the objections of Mr. Mullane and stated that an intermediate decree might be submitted to give effect to such disposition.

Mr. Mullane thereafter duly appealed from the intermediate decree in question. The matter was duly argued before the Appellate Division of the Supreme Court, First Department. That Court in the May 1948 term affirmed the decree appealed from with costs to the respondents and printing disbursements to the appellant payable out of the fund. The majority of the Court affirmed without opinion but Van Voorhis, J., dissented with opinion.

Mr. Mullane by notice dated July 7, 1948 appealed to the Court of Appeals from the order of affirmance of the Appellate Division.

There is some question in the minds of the attorneys for the Accounting Trustee and of the Special Guardians whether the order of the Appellate Division is a "final order" as that expression is used in connection with ap-

[fol. 240] peals taken to the Court of Appeals. It has therefore been determined that the Special Guardians should file their reports touching the transactions shown by the account and the questions raised by the petition to the end that a final decree may be made by the Surrogate's Court. As I understand it, Mr. Mullane intends to notice an appeal from such decree as well as from the order of affirmance so that there may be no doubt that the paper properly appealable shall be in the Court of Appeals thus empowering that Court to review the disposition made by the Surrogate's Court and by the Appellate Division of the two questions raised by Mr. Mullane by way of his preliminary report verified May 26, 1947.

I have examined Section 100 c of the Banking Law, the rules and regulations of the Banking Board relating to Common Trust Funds and the Plan of Operation pursuant to which the present Common Trust Fund was constituted. In my opinion, the present fund originated in a manner complying in all respects with the requirements of law.

### The Schedules

Schedule A states the funds received from participants. The schedule indicates the valuation dates when units of participation issued, the number of such units sold on each of such dates, the value per unit and the total amount of money received from the participating funds. By way of this schedule information may be gained of the rise and fall in unit value. Necessarily it started at par because the present account is the first account rendered for this fund. The value has fluctuated from a high of 1.00996 to a low of .93219. I am satisfied that the value per unit was correctly determined in relation to each valuation date.

Schedule A-1 reports realized increases amounting to \$109.18 and calls for no further comment.

Schedule B shows realized decreases aggregating \$466.05. All such decreases reflect fluctuations in market values and are not open to any criticism.

Schedule C-1 states that the charge for the legal services of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for the accounting party, has not been paid and the Court is requested by the accounting party to fix and determine the amount of such charge. The petition and the citation in the proceeding mention this matter and particularize it by desir-



ing the Court to allow these attorneys \$2,000 for legal services in the preparation and settlement of the account plus proper disbursements. I have no objection to the allowance of this fee in the amount requested.

Schedule D reflects units redeemed on valuation dates during the accounting period. In my opinion this schedule is in all respects in order.

Schedule E contains, on a chronological basis, a report of investments made during the accounting period. This is a Discretionary Common Trust Fund. Article III, Section 3.3 of the Plan of Operation for this fund provides that the Trustee may invest and reinvest any moneys at any time [fol. 242] forming any part of the Common Fund

"in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, Common and Preferred Stocks, bonds, debentures, notes and other evidences of indebtedness, and shall not be limited in the making of such investments to securities permitted by law for investment by Trustees."

The Trustee by Section 3.4 of Article III of said Plan is subject to certain limitations on investment powers.

Examined in the light of the investment powers of the Trustee and considered likewise in terms of intrinsic suitability, it is my opinion that the investments made during the accounting period are not questionable. An effort has been made to procure a diversified portfolio consisting of Government, railroad, utility and industrial bonds, railroad, utility and industrial Preferred Stocks and railroad, utility, industrial, bank and insurance Common Stocks. At the outset of the account 30% of the assets of the Common Fund was invested in Common Stocks and this relationship in substance persisted throughout the first year of administration.

Schedule E, in addition to reporting new investments throughout the accounting period, likewise, reports securities exchanged and the application of certain dividend arrearages received to reduce the inventory value of the investment in Commonwealth & Southern Corporation Preferred and in Niagara Hudson Power Corporation Preferred [fol. 243] ferred. Briefly the use of the dividends to reduce inventory in these instances is a consequence of the circumstance that the arrears existing when the securities were



bought were reflected in the price necessarily paid for such securities at that time. The adjustment reported as between principal and income seems fair and reasonable. This schedule also shows a reduction in inventory value of American Tel. & Tel. Co. arising from the sale of rights during the accounting period.

By Schedule E it is made to appear that during this accounting period no liquidating accounts were made necessary under the provisions of Section 100 c, subdivision 7, of the Banking Law.

Schedule F reports the principal investments and cash remaining on hand January 30, 1947, which is the closing date of the account. The inventory value on that date is shown by this schedule to have been \$2,873,552.39, which, of course, exceeds the actual values on hand on that date as reflected by market quotations and comparable sources of information. Market values January 30, 1947 are contained in Schedule K-1, pages 71 to 77 inclusive. Such market values aggregated \$2,775,074.24.

I have examined to the best of my ability instances of unrealized losses as at the end of the accounting period and I am of the view that such unrealized losses on that date were attributable to market fluctuation and cannot be charged to negligence either in original investment or in the administration of the fund.

Schedule G describes the participants in the Common Trust Fund and indicates the extent of the respective interests of such participants therein. In substance this is an information schedule.

Schedules H, I and J are income schedules of no immediate concern to the persons represented by me.

Schedule K-1 lists the investments and cash in hand at each valuation date throughout the accounting period and indicates the principal value for each unit of participation as based on such valuation. The valuations were made in this fund on a monthly basis. I am satisfied from the schedule and from my study of the minutes of the Trustee that the detail of the schedule is correct.

Schedule K-2 is an income schedule of no immediate concern to the persons represented by me.

Schedule L containing a statement of all other matters affecting the administration of the fund makes reference to the compensation to be paid the attorneys for the accounting Trustee for services rendered in connection with the

preparation and settlement of the account. The amount sought for such service is \$2,000 and is evidently reasonable. This schedule also raises a question concerning the disposition of certain dividends payable in the stock of the Atlantic City Electric Company by the American Gas & Electric Company subject to anticipated approval by the Securities and Exchange Commission. The dividends in question will be in lieu of cash dividends according to the allegations contained in Article Ninth of the petition. The petitioner accordingly considers that these dividends when received [fol. 245] should be treated as if ordinary cash income. This appears to me to be sound under the case law since the dividend is not a stock dividend within the meaning of that expression as used in the cases and also as used in Article VII, Section 7.1 of the Plan of Operation.

#### Conclusion

I have examined the transactions reported in this account to the best of my ability. In my opinion the account should be settled as filed.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal.

(Verified July 30, 1948.)

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[fol. 246] SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1948

Edward J. Glennon, J. P.; Albert Cohn, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, J. J.

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#### **Memorandum Decision of Appellate Division and Dissenting Opinion of Van Voorhis, J.**

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company Established under Plan of Operation Dated December 20, 1945; KENNETH J. MULLANE, as Special Guardian and

Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have, Any Interest in the Income of the Above-named Discretionary Common Trust Fund No. 1, Appearing Specially, Appellant; CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover [fol. 247] Bank and Trust Company Established under Plan of Operation Dated December 20, 1945, and JAMES N. VAUGHAN, as Special Guardian and Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have Any Interest in the Principal or Capital of the Above-named Discretionary Common Trust Fund No. 1, Respondents

Appeal from the Intermediate Decree of the Surrogate's Court, New York County, Entered November 26, 1947, Which Overruled Two Objections of the Special Guardian and Attorney, Addressed to the Jurisdiction of the Court, in a Proceeding Brought for the Judicial Settlement of the First Account of Proceedings of Central Hanover Bank and Trust Company as Trustee of Its Discretionary Common Trust Fund No. 1, Pursuant to Section 100-C of the Banking Law

Kenneth J. Mullane, Special Guardian and attorney for certain persons interested in income, appellant.

Albert B. Maginnes, of counsel (J. Quincy Hunsicker, 3rd, with him on the brief; Rathbone, Perry, Kelley & Drye, attorneys), for trustee-respondent.

[fol. 248] James N. Vaughan, special guardian and attorney, respondent.

Decree affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund. No opinion. (Van Voorhis, J. dissents. Dissenting opinion by Van Voorhis, J.)

## DISSENTING OPINION

VAN VOORHIS, J. (Dissenting):

I dissent and vote to reverse the decree appealed from and to dismiss the petition upon the ground that the portion of section 100-c of the Banking Law relating to judicial settlement of common trust fund accounts is unconstitutional by reason of lack of provision for adequate notice to beneficiaries. (*Matter of Security Trust Company of Rochester*, 189 Misc. 748 and cases cited.) As the opinion below states:

“The fundamental requisite of due process of law is the opportunity to be heard. \* \* \* And it is to this end, of course, that summons or equivalent notice is employed’ (*Grannis v. Ordean*, 234 U. S. 385, 394).”

The notice to the interested party must be such “as to make it reasonably probable that he will receive actual notice” (*Wuchter v. Pizzutti*, 276 U. S. 13, 19). While the legislature has the power to prescribe the type of notice, it “cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution” (*Martin v. Central Vermont R. R. Co.*, 50 Hun 347, 350). Considering the proceeding as [fol. 249] quasi in rem, the practicability of giving notice in a particular manner bears upon whether due process of law has been observed. Both appellant and the respondent trustee are in agreement that “the test of the adequacy of the notice \* \* \* is a practical one depending upon all the circumstances of the particular case” (Appellant’s Brief, p. 15; Respondent Trustee’s Brief, p. 14). Although that statement may be an oversimplification, it has the merit of being concise and concrete, and it furnishes a satisfactory criterion for the purposes of this case.

It seems manifest that the notice of judicial settlement provided for by section 100-c of the Banking Law fails to meet that test of constitutionality. I do not consider that notice personally or by mail to all possible remaindermen is required by due process, but it appears affirmatively on the face of this statute that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as



would have been likely to reach those beneficiaries who are currently interested in the income, as well as the greater portion of those who are interested in the principal of the common fund. The only notice of judicial settlement of common trust fund accounts which is provided by this Act, is publication for not less than once in each week for four successive weeks, in a newspaper to be designated by the Court, of a notice or citation addressed generally "without naming them" to all parties interested in such common trust fund and in the estates, trusts or funds mentioned in the [fol. 250] petition (Banking Law, sec. 100-c, subd. 12). It is further expressly provided that not even the residence need be stated of the decedent or donor of any such estate, trust or fund. In this instance, the citation, addressed to no persons named as beneficiaries, was published four times in the New York Law Journal. Except to the eye of the most "wary vigilance", the publication of the citation in that manner was without practical effect.

The practicability of giving much more effectual notice than this appears from the clause in subdivision 9 of section 100-c that at the time of making the first investment of any estate, trust or fund in a common trust fund, the trust company shall send "a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which the estate, trust or fund will become distributable should have occurred at the time of sending such notice." It is remarkable that so much care should have been taken by the statute to inform interested parties of the general structure of the law, and of the making of the initial investment in the common fund, which the beneficiaries would be powerless to alter or to prevent, but that the Act should limit so drastically as to render practically nugatory the much more important notice of the judicial settlement of the accounts of the trustees. Beneficiaries might be heard in court and perhaps have something to say about the accounting, which [fol. 251] the Act implies to be undesirable. Captious or narrow-minded objections to trustees' investments are of course undesirable. They do cause unnecessary expense in



litigation, and tend to promote excess caution on the part of trustees in investment policy. Nevertheless, due process of law requires that beneficiaries shall have reasonable opportunity to be heard, even if their objections may sometimes be ill advised.

The reasoning of respondent trustee is unsound that inasmuch as it may be impracticable to give notice by mail of application for judicial settlement to all possible remaindermen, therefore it is unnecessary thus to notify any interested persons, not even the income beneficiaries to whom the trust company is currently paying interest or dividends. The names and addresses of these last are on the books of the fiduciary, and the statute could easily have provided for the mailing of notices of the judicial settlement to them, as well as to the presently known persons whose names and addresses are or should be also upon the books of the fiduciary as persons entitled to share in the principal if the determining contingency were to have occurred simultaneously with sending out the notice of the initial investment. Such persons are required to be notified, as above stated, of the first investment in the common fund. They could just as easily be notified of the judicial settlement. To them could readily have been added, what the Act likewise omits, that notice of judicial settlement should be mailed to such other interested persons as shall have applied in writing to have their names and addresses carried on the books of the corporate fiduciary for that [fol. 252] purpose. The circumstance that it may be impracticable to give effectual notice to all interested parties is hardly a reason for not giving such notice to any. This is recognized in the case of the statutory requirements applicable to the judicial settlement of the accounts of the committee of an incompetent, where notice is to be given in such manner as the court deems proper, and may be "to one or more relatives" of the incompetent (Civil Practice Act, sec. 1381, subd. 2; sec. 1360; cf. *Matter of Batley*, 260 App. Div. 362. That is more in accordance with the provision of the Uniform Common Trust Fund Act, section 2 of which permits judicial settlement of accounts "on such conditions as the court may establish", leaving it to the court to provide for such notice in the particular case as shall satisfy the requirements of due process.

On this appeal the question under review is whether the provisions of section 100-c of the Banking Law respecting

notice are adequate, not how the statute could be redrawn so as to make them so. Nevertheless, in my view, it may well be that notice of judicial settlement would be adequate if, in addition to publication, it were mailed to beneficiaries currently receiving income from the trust company, as well as to such remaindermen and reversioners as were subject to notification under subdivision 9 at the time of making the first investment, plus such other persons having an interest in the principal or secondary income beneficiaries as might furnish in writing their names and addresses to the trust company for the purpose of receiving such notices. Perhaps provision could be made for adding other new names at stated intervals according to some workable rule. [fol. 253] Names could be authorized to be dropped from the list upon proof that their interests had ceased. This is not the occasion to try to formulate a new statute, but it seems to me that these, or some similar provisions, would furnish the minimal requirement, on the theory that the self-interest of those whom it would be practical to notify would be sufficiently similar to that of the others so that the latter could be said to be represented in some sense by the former.

It is idle to assert that without this exact provision of section 400-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in the statutes of the other 28 states having legislation upon this subject.\* The alternative is not between this statute or no statute at all. This would seem to be indicated sufficiently by the fact that the testimony in the record shows that the largest common trust funds enumerated are in Philadelphia, Pennsylvania (the Pennsylvania Company having a discretionary fund of 1,607 trusts worth \$32,000,000, and a legal fund having 1,318 trusts worth \$11,000,000), where there is no provision in the act authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration thereof.

Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to de-

\* C. C. H. Trust and Estate Reports, Vols. I and II.

termining that the securities in the fund (or proceeds of [fol. 254] sale thereof) are on hand, and that those securities which are required to be "legals" are actually such. "The superintendent shall have no other duty or responsibility in respect to the administration of common trust funds" (100-c, subd. 13). Even if the superintendent had supervisory power over the selection of these investments, that would not deprive the beneficiaries of the right to hold trustees to account for the exercise of reasonable care and good faith in respect to investments. The opportunity to exercise that right is reduced by this statute to the vanishing point. The broader powers of the superintendent with respect to ordinary banking operations do not supersede liability of bank directors to stockholders for negligence or other misconduct, nor to creditors if the bank becomes insolvent. The same is true of the superintendent of insurance with respect to insurance companies and policyholders.

The Legislature undoubtedly has a considerable latitude in determining the manner of notice to be given. Nevertheless, corporate or other fiduciaries cannot be exempted from practical accountability to interested parties, which in this instance would be in regard to what may easily become a major portion of trust business. The boundaries of legislative discretion are exceeded by an Act which bears upon its face the evidence that it was not designed to give the maximum notice that is practicable, but has been drafted so as to create the appearance without the substance of real notice to any of the beneficiaries. If as much attention had been devoted to devising methods of giving real notice as has been expended on concealing the absence of such notice, its constitutionality would have been well protected.

[fol. 255] This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should be struck down without invalidating the rest of the section. That would not destroy the authority under which existing common funds have been erected, but would leave trustees of such funds to be discharged by the judicial settlements of the participating estates and trusts, as is the case now under the laws of many other states, including Pennsylvania; or such trustees could obtain their discharges pursuant to some subsequent amend-

ment of section 100-c of the Banking Law, provided that the Legislature enacts one authorizing notice to beneficiaries of judicial settlement of the accounts of trustees of common funds which conforms to due process of law.

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[fol. 256] AFFIDAVIT OF NO OTHER OPINION—October 11, 1948

STATE OF NEW YORK.

County of New York, ss.:

Kenneth J. Mullane, being duly sworn, deposes and says that he is an attorney and counsellor at law and is the appellant herein.

That no opinion was rendered herein by the Appellate Division, except the dissenting opinion of Van Voorhis, J., printed herein at pages 246-255.

Kenneth-J. Mullane.

Sworn to before me this 11th day of October, 1948.

Matthew C. Cary, Attorney & Counsellor-at-Law,  
State of New York. Office Address: 350 5th Ave.,  
New York City. Residing in New York Co. Clerk's  
No. 249. Commission expires March 30, 1949.

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[fols. 257-258] STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS—October 11, 1948

It is hereby stipulated and agreed that the foregoing are true and correct copies of the Record on Appeal to the Appellate Division, First Department, as amended, the Stipulation Permitting Additions to Record in Appellate Division, the Order of Affirmance, the Stipulation Saving Rights of Appellant Upon Appeal to Court of Appeals, the Order on Remittitur, the Final Decree on Voluntary Accounting, the Reports of the Respective Special Guardians and the Notices of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the Surrogate's Court of the County of New York, as well as the Memorandum Decision of the Appellate Division and the Dissenting Opinion of Van Voorhis, J., which are on file with the Clerk of the Appellate Division, First Department.

Certification of all of the foregoing papers is hereby waived.

Dated, New York, October 11th, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for Certain Persons Interested in Income, Appearing Specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal, Respondent.

[fols. 259-261] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

#### STATEMENT UNDER RULE 234

This is an appeal from an order of the Appellate Division of the Supreme Court, First Judicial Department, dated April 28, 1949, and from an order of the Surrogate's Court, [fol. 262] New York County, dated May 3, 1949, entered on the remittitur of the Appellate Division, which order of the Appellate Division affirmed (Van Voorhis, J., dissenting) the Final Decree of the Surrogate's Court, New York County, dated August 12, 1948, judicially settling the account of proceedings of Central Hanover Bank and Trust Company, as trustee of its Discretionary Common Trust Fund No. 1, established under Plan of Operation dated December 20, 1945, covering the operations of said Discretionary Common Trust Fund for the period from January 31, 1946 through January 30, 1947.

Pursuant to leave granted by order of the Appellate Division, First Judicial Department, dated March 29, 1949, Appellant also appeals from an order of the Appellate Division, First Judicial Department, dated June 21, 1948, affirming (Van Voorhis, J., dissenting) an Intermediate Decree on voluntary accounting of the Surrogate Court, New York County, in the above trust fund, dated November 26, 1947.

The proceeding was begun on March 28, 1947 by the filing, in the Surrogate's Court, New York County, of the Account of Proceedings of Central Hanover Bank and Trust



Company, covering the period set forth above, together with the petition of Central Hanover Bank and Trust Company, as Trustee aforesaid, verified March 27, 1947, wherein said Trustee sought, among other things, a judicial settlement of its said Account of Proceedings, and by the issuance by said Court on March 28, 1947, of its Citation returnable May 2, 1947.

By order of said Court dated March 31, 1947, Kenneth J. Mullane was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian [fol. 263] and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the income of said Trust Fund.

By order of said Court dated March 31, 1947, James N. Vaughan was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the principal or capital of said Trust Fund.

On May 27, 1947, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, appearing specially, served his preliminary report and answer, verified May 26, 1947, wherein said Special Guardian raised certain objections to the jurisdiction of the said Surrogate's Court.

On June 3, 1947, James N. Vaughan, as Special Guardian and Attorney as aforesaid, served his preliminary report, verified June 2, 1947, wherein said Special Guardian requested that the objections raised by said Kenneth J. Mullane in his preliminary report and answer be dismissed.

On July 30, 1948, James N. Vaughan as Special Guardian aforesaid, served his report verified the same day recommending approval of the account as filed. On August 11, 1948, Kenneth J. Mullane, as Special Guardian aforesaid, served his report, wherein he made no objections to the account as filed, but reiterated the objections to the jurisdiction of the Court as set forth in his Preliminary Report.

The names of all parties and attorneys in this proceeding are set forth above in full.

[fol. 264] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION—March 22, 1949

[Title omitted]

Please take notice that Kenneth J. Mullane, as Special Guardian and Attorney herein, for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals pursuant to law including Civil Practice Act, Section 592, subdivision 5e, on the law and the facts to the Appellate Division of the New York Supreme Court, in and for the First Department, from the final decree of voluntary accounting entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said final decree as adjudges the following:

"Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special [fol. 265] Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

"Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

"Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law

including the service of the citation herein, made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States,"

And upon said appeal the appellant intends to bring up for review the interlocutory decree and every part thereof made in this proceeding, and entered in the office of the Clerk [fol. 266] of the Surrogate's Court of New York County, on or about November 26th, 1947, the intermediate order of the Appellate Division, First Department, dated June 21st, 1948, affirming said interlocutory decree, and so much of the order on remittitur entered in this proceeding in the office of the Clerk of the said Surrogate's Court on August 12th, 1948, as adjudges that the Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law.

Dated: New York, N. Y., March 22nd, 1949.

Yours, etc., Kenneth J. Mullane, Special Guardian  
and Attorney appearing specially, Office and Post  
Office Address, 350 Fifth Avenue, Borough of Man-  
hattan, City of New York.

To Clerk of the Surrogate's Court, New York County;  
Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for  
Central Hanover Bank and Trust Company, Petitioner, 70  
Broadway, New York 4, N. Y.; James N. Vaughan, Esq.,  
Special Guardian and Attorney for certain persons inter-  
ested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 267] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

ORDER OF SURROGATE'S COURT, NEW YORK COUNTY, DATED  
AUGUST 11, 1948, ENTERED AUGUST 12, 1948, ON REMITTITUR  
FROM APPELLATE DIVISION

Present: Hon. William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding [fol. 268] for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section

100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, [fol. 269] Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustees as aforesaid, it is

Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered June 21, 1948 be, and the same hereby is, made the order of this Court; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Six Hundred Ninety-six and 74/100 Dollars (\$696.74) as and for his printing disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Eighty-one and 22/100 Dollars (\$81.22) as and for his costs and disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to itself out of the principal of said Fund the sum of Three Hundred Forty-nine and 67/100 Dollars (\$349.67) as and for its costs and disbursements as taxed herein; and it is further

Ordered that all questions relating to the fees and allowances to which any of the parties hereto, or their attorneys, [fol. 270] may be entitled, by reason of their services either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, rendered up to and including the date of this order be, and they hereby are, re-



served for such disposition as may be made of them in the final decree on accounting to be entered herein.

William T. Collins, Surrogate.

Entered 8/12/48. Office of Clerk of Surrogate's Court, New York County.

# IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

## FINAL DECREE ON VOLUNTARY ACCOUNTING APPEALED FROM— August 12, 1948

Present: Honorable William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946, established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, [fol. 271] and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that the said first account of proceedings be judicially settled and allowed, that a determination be had as to the proper allocation of a certain dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, as between the principal and income accounts of said Discretionary Common Trust Fund and that the compensation of Messrs. Rathbone, Perry, Kelley & Drye for legal services, rendered herein as attorneys for petitioner, in the sum of \$2,000, plus proper disbursements, be fixed and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New York addressed generally without naming them to the persons

interested in said Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust [fol. 272] Company and in the following described Trusts and Estates participants therein.

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the Will of Emanuel Mausbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamaand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust [fol. 273] Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeanette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine W. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by [fol. 274] Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

[fol. 275] Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lohman.

[fol. 276] Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

[fol. 277] Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil [fol. 278] dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.



Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

[fol. 279] Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy, (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision [fol. 280] 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

[fol. 281] Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. de Graffenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and [fol. 282] amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe. [fol. 283] Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catherine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

[fol. 284] Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

~~Trust under indenture dated September 17, 1917,~~  
made by George P. Cammann for Frederic Almy Cammann.

citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereof upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee and to appear for each other party, known or unknown, who did not [fol. 285] otherwise appear in this proceeding who had, has or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Commit-

tee and to appear for each other party, known or unknown, who did not otherwise appear in this proceeding, who had, has, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Banking Law of the State of New York filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled [fol. 286] in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts and since this Court had no jurisdiction over inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceedings and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as such Special Guardian and Attorney as aforesaid, and this Court having entered its Intermediate Decree of Voluntary Accounting dated the 26th day of No-



vember, 1947, wherein and whereby it was ordered, adjudged and decreed that the objections of Kenneth J. Mullane, as such Special Guardian and Attorney, were dismissed and that this Court had jurisdiction to settle petitioner's account of its transactions as Trustee aforesaid and that all of the [fol. 287] proceedings taken under Section 100-c of the Banking Law constituted due process of law, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appealed from said decree dated November 26, 1947, to the Appellate Division of the Supreme Court, First Judicial Department, and the said appeal having been argued before said Court and the said Court having rendered its decision thereon (one of the Justices dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that the said decree of this Court be affirmed with costs to the respondents and printing expenses to the appellant payable out of the fund, and a certified copy of the said order of the said Appellate Division of the Supreme Court, together with the printed record of the papers upon which said appeal was heard, having been duly filed in this Court, and this Court having entered its order dated the 11th day of August, 1948, wherein and whereby it ordered that the said order of the said Appellate Division of the Supreme Court, granted and entered June 21, 1948, be made the order of this Court and that the parties to said appeal to the said Appellate Division of the Supreme Court be paid by Central Hanover Bank and Trust Company, as Trustee as aforesaid, their costs and disbursements as ordered by the said order of the said Appellate Division of the Supreme Court, and Central Hanover Bank and Trust Company, as Trustee as aforesaid, and the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having entered into a stipulation entered the 10th day of August, 1948, wherein and whereby [fol. 288] it was agreed that Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, would not, upon the filing of his report herein passing upon the said account of proceedings, waive the objections he, appearing specially, had heretofore taken herein in his said answer and objections dated May 26, 1947, to the jurisdiction of this Court, and James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed his report, verified the 30th day of July, 1948, and the said Kenneth J. Mullane, as

Special Guardian and Attorney as aforesaid, having duly filed herein his report dated the 11th day of August, 1948, both of which reports approve said account of proceedings concur in the opinion that said dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, constitutes income and not principal of said Discretionary Common Trust Fund and should be disposed of accordingly and approve the fixation and allowance of the fees of said attorneys for the petitioner and no objections having been filed with respect to said account and the time within which any answer or motion with respect to said petition or objections with respect to said account could be made having fully expired, and the petitioner having appeared on the return date of such citation and having rendered its said account under oath, and said account having been filed and the said matter having been adjourned to this day, and the said Surrogate, after having examined the said account, now here finds the state and the condition of the same to be as stated in the following summary statement thereof, made by the Surrogate as judicially settled and adjusted by him to be recorded with and to be taken to be a part of this decree, to wit:

[fol. 289]

**SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE OF DISCRETIONARY COMMON TRUST FUND NO. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY, ESTABLISHED UNDER PLAN OF OPERATION DATED DECEMBER 20, 1945, COVERING THE PERIOD FROM JANUARY 31, 1946 TO JANUARY 30, 1947.**

**Principal Account**

**Charges:**

Amount shown by Schedule A (Funds Received from Participants) .....	\$2,926,328 07	
Amount shown by Schedule A-1 (Increases on Principal) .....	109 18	
Total Principal Charges .....		\$2,926,437 25

**Credits:**

Amount shown by Schedule B (Decreases on Principal) .....	\$ 466 05	
Amount shown by Schedule C (Principal Administration Expenses Paid) .....	-0-	
Amount shown by Schedule D (Units Redeemed by Participants) .....	52,418 81	52,884 86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947) .....		<u>\$2,873,552 39</u>

[fol. 290]

## Income Account

## Charges:

Amount shown by Schedule H (Total Income Received) .....	\$	53,313 33
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## Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants) .....	\$	58,103 72
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Amount shown by Schedule I-2 (Income Administration Expenses Paid) .....	-0-	58,103 72
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Amount shown by Schedule J (Income Cash Remaining on Hand, January 30, 1947) .....	O. D.	\$ 4,790 39
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## Combined Accounts

Principal Remaining on Hand .....	\$2,873,552 39
Income Remaining on Hand .....	O. D. 4,790 39

Total on Hand, January 30, 1947 .....	<u>\$2,868,762 00</u>
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and it appearing to the satisfaction of the said Surrogate that the petitioner has fully accounted for all moneys and property of said trust which came or should have come into its possession, that said account is in all respects complete, correct and in order and that the acts and proceedings of petitioner embraced in said account and in this proceeding have been in all respects in compliance with the requirements of law, and said account of proceedings having been adjusted by said Surrogate and a summary statement [fol. 291] thereof having been made, as above set forth and recorded, it is hereby

Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States, and it is further

[fol. 292] Ordered, adjudged and decreed that said account of proceedings be, and the same hereby is, judicially settled and allowed, and the acts and proceedings of petitioner as embraced in said account and in this proceeding be, and they hereby are, in all respects approved; and it is further

Ordered, adjudged and decreed that said dividend on the stock of the American Gas & Electric Company, payable in said shares of Atlantic City Electric Company, is not a stock dividend within the meaning of the Plan of Operation of said Discretionary Common Trust Fund and is in effect a distribution in lieu of current cash earnings and, therefore, constitutes income and not principal of said Discretionary Common Trust Fund and shall be disposed of accordingly; and

James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 10th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Albert B. Maginnes, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth the services in this Court only of Rathbone, Perry, Kelley & Drye as attorneys for the petitioner herein, and it appearing that Kenneth J. Mullane, as Special Guardian and At-  
[fol. 293] torney as aforesaid, is contemplating taking an appeal from this decree to the Court of Appeals of this State, it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account,

petitioner pay to James N. Vaughan, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Kenneth J. Mullane, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Messrs. Rathbone, Perry, Kelley & Drye the sum of Two thousand dollars (\$2,000) as and for their fee for services in this Court only as attorneys for the petitioner herein as aforesaid, which sums are hereby fixed and allowed as and for their fee and disbursements herein; and it is further

Ordered, adjudged and decreed that all questions relating to the fees and allowances to which any of the parties hereto, [fol. 294] or their attorneys, may be entitled, by reason of their services heretofore rendered in connection with the appeal heretofore taken to the Appellate Division of the Supreme Court, First Judicial Department, by Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, be, and they hereby are, reserved for a supplemental decree to be entered herein after the final determination of such appeals as may be taken and prosecuted herein by any of the parties hereto; and it is further

Ordered, adjudged and decreed that upon the making of the payments herein directed to be made, the petitioner be, and it hereby is, fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree, provided, however, that petitioner shall retain and administer in accordance with the requirements of law the balance of



principal and income remaining in its hands after making the payments herein directed to be made.

William T. Collins, Surrogate.

Entered 8/12/48.

Office of Clerk of Surrogate's Ct., New York County.

Surrogate's Court, N. Y. County.

Filed Aug. 12, 1948.

[fol. 295] IN THE SURROGATE'S COURT FOR NEW YORK  
COUNTY

STIPULATION SAVING RIGHTS OF APPELLANT—August 10, 1948

It is hereby stipulated, consented and agreed that participation by Kenneth J. Mullane, Esq., as special guardian and attorney for certain persons interested in income, in any further proceedings herein in the Surrogate's Court shall not prejudice, impair or affect in any manner or to any extent his right to appeal from any determination heretofore or hereafter made respecting the two certain objections which he heretofore, appearing specially, made to the jurisdiction of said court or his right to a hearing and determination on the merits respecting said objections on any such appeal.

Dated: New York, N. Y., August 10, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for Certain Persons Interested in Income, Appearing Specially; James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal; Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner.

[fol. 296] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN  
PERSONS INTERESTED IN INCOME—August 11, 1948

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard,

or other incompetent not appearing by a Committee, and for each other party known or unknown who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially; do respectfully report:

#### Nature of Proceeding

This proceeding was commenced by Central Hanover Bank and Trust Company, trustee of Discretionary Common Trust Fund No. 1, established by it under a Plan of Operation dated December 20th, 1945, for the judicial settlement of its first intermediate account as such trustee and for a determination of certain matters with respect to its administration of the fund. This common trust fund was established pursuant to Section 100-c of the Banking Law of the State of New York and the Regulations of the Banking Board of the State of New York with respect thereto. The account covers the first year of operation of the fund, to wit, from January 31st, 1946 to January 30th, 1947.

[fol. 297]

#### Jurisdiction of This Court

The petition and account herein were filed in the office of the Surrogate of New York County on March 28th, 1947 in compliance with Subdivision 10 of Section 100-c of the Banking Law which requires that not less than twelve months nor more than fifteen months after the date on which a common trust fund is first established, the trust company maintaining it shall file an account of its proceedings in respect thereto and a petition for the judicial settlement thereof either in the office of the Clerk of the Supreme Court or in the office of the Surrogate in the County in which the trust company maintains its principal office. Upon the filing of the petition and account a citation was issued addressed to the various trusts having an interest in the fund. Pursuant to the provisions of the statute the citation did not name any of the persons interested in the separate trusts. The return day of the citation was May 2nd, 1947. An order of publication of the citation was made and publication effected pursuant thereto. Neither personal service nor mailing of the citation was required by the statute and none was made. I have examined the proof of service of

the citation filed herein and find that the statute and order of publication were complied with.

By Preliminary Report, dated May 26th, 1947, I raised two objections to the jurisdiction of this Court which were overruled by an intermediate decree of this Court, dated November 26th, 1947. Thereafter I appealed from said decree to the Appellate Division which affirmed said intermediate decree (one Justice dissenting) by an order dated [fol. 298] June 21st, 1948. Subsequently, I appealed by Notice of Appeal dated July 7th, 1948 from the said order of the Appellate Division to the Court of Appeals which appeal is now pending. Accordingly I specifically reserve all my rights relating to any such appeal and neither the service and filing of this present Report nor anything contained herein shall be construed as a waiver of any of such rights.

#### Persons Represented and Nature of Their Interests

My appointment was made pursuant to Subdivision 12 of Section 100-c of the Banking Law which requires that upon the filing of a petition for the judicial settlement of the account of the trustee of a common trust fund, the Court shall appoint two persons, one to appear as Special Guardian and Attorney for certain parties who may be interested in the income of the common trust fund and the other to appear for the parties having an interest in the principal or capital of the trust fund. By order of Mr. Surrogate James A. Delehanty made on March 31, 1947 I was appointed Special Guardian and Attorney for the persons having an interest in the income of the fund.

My examination of the files of this Court with respect to this proceeding indicates that there have been no appearances herein except by counsel for the accounting trustee, by James N. Vaughan, Esq. similarly appointed as Special Guardian and Attorney for persons having an interest in the principal of the fund and by the undersigned Special Guardian and Attorney. I therefore represent all persons, either infants or adults, competent or otherwise, [fol. 299] who have any interest in the income of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company accounted for in this proceeding. The interest of these persons arises from their interest as income beneficiaries in the different trusts and funds which have participations in the common trust fund.

## Operation of the Fund

The Plan of Operation of the common trust fund is dated December 20th, 1945. It was established pursuant to Section 100-c of the Banking Law and the Regulations of the Banking Board.

Pursuant to the Plan initial units were issued by Central Hanover as trustee thereof as of January 31, 1946. 717,621 units were issued at that time. Additional units were issued monthly thereafter—the last issuance reported in this account being as of December 31, 1946. A total of 2,962,276 were issued—55,396 of which were withdrawn during the period accounted for.

The Plan of Operation provides that the fund is established, operated and maintained for investment of moneys contributed thereto from funds of which Central Hanover is either the sole fiduciary or a co-fiduciary with others.

I have not examined the instruments under the terms of which investment was made in the participating units of the common trust fund, in view of the ruling in Matter of Hoaglund.

[fol. 300]

### Scope of My Examination

In the course of my duties as Special Guardian and Attorney, I have studied the provisions of the Banking Law applicable to common trust funds and the regulations issued by the Banking Board from time to time with respect thereto. I have examined the petition, account, affidavit of legal services and other papers on file in this Court on this proceeding.

I have attended at the office of the accounting trustee and conferred with the assistant vice-president in charge of the administration of the fund. I have there examined various records and documents including minutes of the Trust Investment Committee.

I have examined a copy of the audit and condition of this fund, prepared for the Board of Trustees of Central Hanover.

I have examined forms of notice of first investments mailed to beneficiaries pursuant to Subdivision 9 of Section 100-c of the Banking Law and Section 2.4 of Article II of the Plan of Operation, memoranda placed in the records of the individual funds reporting the investment by acquisi-



tion of stated units of participation in the Discretionary Common Trust Fund, statements of review and recommendation of the trust administration and trust investment departments with respect to investment of units in the common trust fund for a particular trust, notices of intention to invest in the common trust fund, opinions of counsel as to the eligibility of individual trusts to participate in the fund and other records of the trustee with respect to this Discretionary Common Trust Fund.

[fol. 301] I have examined the certificate of the Superintendent of Banks filed in this proceeding.

It is my opinion that all of the records of the trustee herein are kept in compliance with the requirements of the Plan of Operation and the Regulations of the Banking Board.

#### Notice With Respect to Issuance of Units

Article VI of the Plan of Operation specifies that no participation shall be admitted to or withdraw from the common fund except as of a valuation date and that at least five days prior notice must be given of intention to participate in or withdraw from the fund. From my examination of the records of the trustee, particularly the minutes of the Trust Investment Committee, and the files of the individual participant funds, I believe that the requirements as to these notices were properly carried out.

I further ascertained that pursuant to Section 2.4 of Article II of the Plan of Operation and Subdivision 9 of Section 100-c of the Banking Law that when the first investments, from a particular fund were made in the Discretionary Common Trust Fund notices were given to the classes of interested persons prescribed by the statute. At the same time copies of certain provisions of Section 100-c of the Banking Law were forwarded to these beneficiaries.

#### Limitations On Amounts of Participations

Subdivision I of Section 100-c of the Banking Law and Section 4 of Article II of the Plan of Operation prescribe [fol. 302] certain limitations on the participation of the separate funds in the common fund. For instance, no trust may participate to the extent of more than 10% of the value of the assets of the common fund or the sum of \$50,000 whichever is the lesser. There are additional limitations when more than one trust is created by the same settlor.



In the common fund a number of participations are held by different trusts created by the same settlor or under the same will. For instance, the account shows that nine trusts provided for under the last will and testament of Adolph L. Gondran participate in this fund. However, it appears that on the basis of the "presently payable" test which has been approved in Matter of Bank of New York no one fund established thereby has in excess of the limitation on the amount of participations permitted. As is shown by its questionnaire with respect to the eligibility to participate by any particular trust, the trustee endeavors to take all reasonable precautions to ascertain that no participation might exceed the limitations.

### Schedules of the Account

#### *Investment and reinvestment in securities*

Schedules A-1, and E of the account herein set forth the details of purchase of securities constituting principal of the trust and sales redemptions and other dispositions of certain of them and the gain or loss resulting therefrom. The securities purchased for the fund were acquired between February 1, 1946 and January 23, 1947, the total investment in that period being \$2,923,441.44. The majority [fol. 303] of the investments originally purchased were retained throughout the period accounted for.

Increases on sales and redemptions during the period accounted for are shown in Schedule A-1 of the account and total \$109.18. Decreases realized during the period amounted to \$466.05.

#### *Income Received and Disbursed*

Schedule H of the account sets forth the income received during the period accounted for and Schedule I-1 shows the payments from income to the participating trusts. Schedule J shows the balance of income on hand as of January 30, 1947, the last date covered by the account.

Income received is reported on a cash basis. The distribution of income has been computed on an accrual basis pursuant to Article VII, Section 7.2 of the Plan. Thus although the total income received in the period from January 31, 1946 to January 30, 1947, less income accrued at time of purchase was \$53,313.33 (Schedule H), the income

distributed to January 30, 1947 was \$58,103.72. Income accrued but not received on January 30, 1947 was \$10,393.59.

### *Periodic Valuations of Principal and Income*

Schedule A of the account sets forth a schedule of the participations held with valuations as of the opening of business on the different valuation dates, to wit, January 31st, 1946 and approximately monthly thereafter. This method of valuation is prescribed in Article 5 of the Regulations of the Banking Board and Article V of the Plan of Operations.

[fol. 304] Income was also valued pursuant to the regulations and the Plan. The income was valued on an accrual basis thus enabling the Trust Investment Committee to ascertain the amount of income distributable as of a valuation date, even though it had not been received in full.

This caused a periodic income overdraft. These distributions of income were made directly after the income valuations were determined when it was ascertained how much per unit was to be distributed. Included in accrued income was bond interest and dividends declared on stock and payable to holders of record at the time of the valuation date.

As of January 30, 1947 the valuation of securities constituting principal of the fund was \$2,734,724.07. Principal cash as of that date was \$40,350.17, making a total principal value, as shown in Schedule K-1 of \$2,775,074.24. Thus the actual value of the fund as of January 30, 1947 consisting of cash as of that date and securities valued as of that date was \$2,775,074.24. Schedule F of the account shows the total value of the property constituting principal and remaining in the hands of the trustee as of January 30, 1947 was \$2,873,552.39. However, this difference from the foregoing is due to the fact that in Schedule F securities are carried at their cost or inventory value rather than their market value as of January 30, 1947.

### *Audit of the Discretionary Common Trust Fund*

Article 10 of the Regulations of the Banking Board requires that an audit of the common trust fund be made once [fol. 305] during each twelve month period by auditors responsible only to the Board of Trustees and that audit shall contain a list of investment valuations, statement of pur-

chases and other information. This section requires that the trustee shall send a copy of this audit annually to each person to whom a regular periodic accounting of the participating fund ordinarily would be rendered or shall send advice to such persons that the report is available and that a copy will be furnished without charge upon request. Article VIII of the Plan of Operation provides for this audit and for the furnishing of a copy thereof to income beneficiaries of each of the participating trusts, to co-fiduciaries and to certain other persons. I have obtained a copy of the audit made to the Board of Trustees by Price, Waterhouse & Company, accountants and auditors, for the period down to January 31, 1947. This report has been prepared in pamphlet form with a letter to the beneficiaries from the President of Central Hanover. I have been informed that a copy is being mailed without charge to all of the income beneficiaries and to other persons required under the provisions of the Plan of Operation and the Regulations of the Banking Board.

#### *Stock Dividends*

The petition herein contains the following allegations:

"Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for [fol. 306] the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received."

Upon information and belief derived from the Attorneys for the petitioner, the earnings on said common stock during the period from 1940 to 1946 inclusive always exceeded \$2.00 per annum whereas the dividend paid on said stock never exceeded \$2.00 per annum except in the year 1946 when the dividend was \$2.15 per annum and the earnings for that year were \$3.80. On information and belief the proposed stock dividend is not a true stock dividend within the meaning of the Plan of Operation but is a distribution out of current earnings in lieu of cash; accordingly, pursuant to Article VII, Section 7.1, paragraphs [fol. 307] two and four of the Plan of Operation the said dividend should be wholly allocated to income.

### *Conclusion*

Apart from my objections addressed to the jurisdiction of the Court which are set forth in my Preliminary Report dated May 26th, 1947 and which I reiterate and hereby preserve, I have no objection to the Account herein.

Dated New York, August 11, 1948.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

(Verified August 11, 1948.)

### IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

#### REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN PERSONS INTERESTED IN PRINCIPAL—July 30, 1948

In March 1947 I was appointed Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee and for each party known and unknown not otherwise appearing in this proceeding who has or may hereafter have [fol. 308] any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq. was appointed to represent similarly described persons who have or may hereafter have



an interest in income account of said Common Trust Fund.

Mr. Mullane filed a preliminary report verified May 26, 1947 objecting to the jurisdiction of this Court to grant the petition. He alleged that the law pursuant to which the Common Trust Fund was created and under which it is administered was constitutionally unsound. He also objected to what he described as the commingling in the Common Trust Fund of moneys from *inter vivos* trusts and moneys from testamentary trusts on the ground that this Court lacked jurisdiction over *inter vivos* trusts and hence could not make a valid decree in the present proceeding.

As Special Guardian for various persons interested in principal account I filed a preliminary report verified June 2, 1947 requesting that the objections of Mr. Mullane be dismissed as insufficient in law.

Such proceedings were thereafter had as resulted in a hearing before Mr. Surrogate Collins. The Surrogate in an opinion appearing in the New York Law Journal November 7, 1947 overruled the objections of Mr. Mullane and stated that an intermediate decree might be submitted to give effect to such disposition.

Mr. Mullane thereafter duly appealed from the intermediate decree in question. The matter was duly argued before the Appellate Division of the Supreme Court, First Department. That Court in the May 1948 term affirmed the [fol. 309] decree appealed from with costs to the respondents and printing disbursements to the appellant payable out of the fund. The majority of the Court affirmed without opinion but Van Voorhis, J. dissented with opinion.

Mr. Mullane by notice dated July 7, 1948 appealed to the Court of Appeals from the order of affirmance of the Appellate Division.

There is some question in the minds of the attorneys for the Accounting Trustee and of the Special Guardians whether the order of the Appellate Division is a "final order" as that expression is used in connection with appeals taken to the Court of Appeals. It has therefore been determined that the Special Guardians should file their reports touching the transactions shown by the account and the questions raised by the petition to the end that a final decree may be made by the Surrogate's Court. As I understand it, Mr. Mullane intends to notice an appeal from such decree as well as from the order of affirmance so that there may be no doubt that the paper properly appealable shall be in the



Court of Appeals thus empowering that Court to review the disposition made by the Surrogate's Court and by the Appellate Division of the two questions raised by Mr. Mullane by way of his preliminary report verified May 26, 1947.

I have examined Section 100 c of the Banking Law, the rules and regulations of the Banking Board relating to Common Trust Funds and the Plan of Operation pursuant to which the present Common Trust Fund was constituted. In my opinion, the present fund originated in a manner complying in all respects with the requirements of law.

[fol. 310]

#### The Schedules

Schedule A states the funds received from participants. The schedule indicates the valuation dates when units of participation issued, the number of such units sold on each of such dates, the value per unit and the total amount of money received from the participating funds. By way of this schedule information may be gained of the rise and fall in unit value. Necessarily it started at par because the present account is the first account rendered for this fund. The value has fluctuated from a high of 1.00996 to a low of .93219. I am satisfied that the value per unit was correctly determined in relation to each valuation date.

Schedule A-1 reports realized increases amounting to \$109.18 and calls for no further comment.

Schedule B shows realized decreases aggregating \$466.05. All such decreases reflect fluctuations in market values and are not open to any criticism.

Schedule C-1 states that the charge for the legal services of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for the accounting party, has not been paid and the Court is requested by the accounting party to fix and determine the amount of such charge. The petition and the citation in the proceeding mention this matter and particularize it by desiring the Court to allow these attorneys \$2,000 for legal services in the preparation and settlement of the account plus proper disbursements. I have no objection to the allowance of this fee in the amount requested.

Schedule D reflects units redeemed on valuation dates [fol. 311] during the accounting period. In my opinion this schedule is in all respects in order.

Schedule E contains, on a chronological basis, a report of investments made during the accounting period. This is a

**Discretionary Common Trust Fund.** Article III, Section 3.3 of the Plan of Operation for this fund provides that the Trustee may invest and reinvest any moneys at any time forming any part of the Common Fund.

“in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, Common and Preferred Stocks, bonds, debentures, notes and other evidences of indebtedness, and shall not be limited in the making of such investments to securities permitted by law for investment by Trustees.”

The Trustee by Section 3.4 of Article III of said Plan is subject to certain limitations on investment powers.

Examined in the light of the investment powers of the Trustee and considered likewise in terms of intrinsic suitability, it is my opinion that the investments made during the accounting period are not questionable. An effort has been made to procure a diversified portfolio consisting of Government, railroad, utility and industrial bonds, railroad, utility and industrial Preferred Stocks and railroad, utility, industrial, bank and insurance Common Stocks. At the outset of the account 30% of the assets of the Common Fund was invested in Common Stocks and this relationship in substance persisted throughout the first year of administration.

[fol. 312] Schedule E, in addition to reporting new investments throughout the accounting period, likewise, reports securities exchanged and the application of certain dividend arrearages received to reduce the inventory value of the investment in Commonwealth & Southern Corporation Preferred and in Niagara Hudson Power Corporation Preferred. Briefly the use of the dividends to reduce inventory in these instances is a consequence of the circumstance that the arrears existing when the securities were bought were reflected in the price necessarily paid for such securities at that time. The adjustment reported as between principal and income seems fair and reasonable. This schedule also shows a reduction in inventory value of American Tel. & Tel. Co. arising from the sale of rights during the accounting period.

By Schedule E it is made to appear that during this accounting period no liquidating accounts were made neces-

sary under the provisions of Section 100 c, subdivision 7, of the Banking Law.

Schedule F reports the principal investments and cash remaining on hand January 30, 1947, which is the closing date of the account. The inventory value on that date is shown by this schedule to have been \$2,873,552.39, which, of course, exceeds the actual values on hand on that date as reflected by market quotations and comparable sources of information. Market values January 30, 1947 are contained in Schedule K-1; pages 71 to 77 inclusive. Such market values aggregated \$2,775,074.24.

I have examined to the best of my ability instances of un-[fol. 313] realized losses as at the end of the accounting period and I am of the view that such unrealized losses on that date were attributable to market fluctuation and cannot be charged to negligence either in original investment or in the administration of the fund.

Schedule G describes the participants in the Common Trust Fund and indicates the extent of the respective interests of such participants therein. In substance this is an information schedule.

Schedules H, I and J are income schedules of no immediate concern to the persons represented by me.

Schedule K-1 lists the investments and cash in hand at each valuation date throughout the accounting period and indicates the principal value for each unit of participation as based on such valuation. The valuations were made in this fund on a monthly basis. I am satisfied from the schedule and from my study of the minutes of the Trustee that the detail of the schedule is correct.

Schedule K-2 is an income schedule of no immediate concern to the persons represented by me.

Schedule ~~containing~~ containing a statement of all other matters affecting the administration of the fund makes reference to the compensation to be paid the attorneys for the accounting Trustee for services rendered in connection with the preparation and settlement of the account. The amount sought for such service is \$2,000 and is evidently reasonable. This schedule also raises a question concerning the disposition of certain dividends payable in the stock of the Atlantic City Electric Company by the American Gas & Electric Com-[fol. 314] pany subject to anticipated approval by the Securities and Exchange Commission. The dividends in

question will be in lieu of cash dividends according to the allegations contained in Article Ninth of the petition. The petitioner accordingly considers that these dividends when received should be treated as if ordinary cash income. This appears to me to be sound under the case law since the dividend is not a stock dividend within the meaning of that expression as used in the cases and also as used in Article VII, Section 7.1 of the Plan of Operation.

### Conclusion

I have examined the transactions reported in this account to the best of my ability. In my opinion the account should be settled as filed.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal.

(Verified July 30, 1948.)

[fol. 315] IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—March 4, 1949

In the Matter of the Judicial Settlement &c. of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee &c.

KENNETH J. MULLANE, as Special Guardian &c., Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee &c., and JAMES N. VAUGHAN, as Special Guardian, &c., Respondents.

Be it remembered, That on the 25th day of October in the year of our Lord one thousand nine hundred and forty-eight, Kenneth J. Mullane, as Special Guardian &c., the appellant—in this cause, came here unto the Court of Appeals, in person, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, and from the order and decree of the Surrogates' Court, New York County. And Central Hanover Bank and [fol. 316] Trust Company, as Trustee &c., and James N. Vaughan, as Special Guardian &c., the respondents in said

cause, afterwards appeared in said Court of Appeals by Rathbone, Perry, Kelley & Drye, & ano., their attorneys.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth J. Mullane, of counsel for the appellant, and by Messrs. Albert B. Maginnes and James N. Vaughan, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the appeals herein be and the same hereby are dismissed, with costs to the respondent Trustee payable out of the fund upon the following grounds:

As to the appeal taken directly to this Court from so much of the final decree of voluntary accounting (entered in Surrogates' Court August 12, 1948) as overrules objections interposed by the appellant, such decree may not be the subject of direct appeal to this Court because the determination thereby made was not one which the Surrogate "must grant" upon a motion for judgment or order (Civil Practice Act, Section 590-b).

As to the appeal from the order of the Appellate Division (entered June 21, 1948) affirming an intermediate decree of Surrogates' Court (entered November 26, 1947) in a voluntary accounting proceeding, such order—being a ruling upon objections in the nature of pleadings (Surrogates' Court Act, Section 49)—is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution.

[fol. 317] As to the appeal taken directly to this court from an order of Surrogates' Court entered August 12, 1948, upon the remittitur of the Appellate Division—such order is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution and may not be the subject of direct appeal to this Court under Civil Practice Act, Section 590-b.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law.

Therefore, it is considered that the said appeals be dismissed, with costs to the respondent Trustee payable out of the fund &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals



aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, March 4, 1949.

[fol. 318] I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

(Seal—State of New York, Court of Appeals)

#### IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

ORDER OF SURROGATE'S COURT, NEW YORK COUNTY, DATED MARCH 28, 1949, ENTERED ON REMITTITUR OF COURT OF APPEALS

Present: Hon. William T. Collins, *Surrogate*.

[Title omitted]

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, [fol. 319] for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding,

who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over inter vivos trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by this Court

thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs [fol. 321] and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys and filed herein that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any determination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August 11, 1948, respectively, wherein and whereby they approved petitioner's said first account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division [fol. 322], for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the

proceedings taken herein under Section 100-c of the Banking Law constituted due process of law and said appeal having come on for argument before the Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having by order dated March 4, 1949 ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 [fol. 323] of the Civil Practice Act and, as to the appeal from said order of the Appellate Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court.

Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for petitioner, Central Hanover Bank and Trust Company, as Trustee as aforesaid, it is

Ordered that said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is further

Ordered that all questions relating to the fees, costs and allowances to which any of the parties hereto or their attorneys may be entitled, by reason of any proceedings either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, or in the Court of Appeals be and they hereby are reserved for a supplemental decree to be entered herein.

W. T. C., Surrogate.

[fol. 324] IN NEW YORK SUPREME COURT,<sup>3</sup> APPELLATE DIVI-  
SION—FIRST DEPARTMENT

STIPULATION AS TO RECORD—March 28, 1949

[Title omitted]

[fol. 325] It is hereby stipulated and agreed by and between the undersigned as follows, subject to the approval of this Court:

1. That the appeal taken herein by Notice of Appeal dated and filed March 22nd, 1949, from the Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948, shall be submitted to this Court without argument on seven printed copies of each of the respective briefs and seven printed copies of the Record on Appeal heretofore filed herein in connection with the appeal heretofore taken from the Intermediate Decree of the Surrogate's Court, New York County, dated November 26, 1947, and upon the usual number of printed copies of the Supplemental Briefs and the Supplemental Record, the former Record on Appeal and the Supplemental Record, together constituting the Record on Appeal herein.

2. Said Supplemental Record shall consist of the following documents:—

(a) Statement under Rule 234;

(b) Notice of Appeal to Appellate Division dated March 22, 1949, from Final Decree of Surrogate's Court, New York County, dated, entered and filed on August 12, 1948;

(c) Order of the Surrogate's Court, New York County, dated August 11, 1948, entered and filed on August 12, 1948, on the remittitur from the Appellate Division;

(d) The Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948;

[fol. 326] (e) Stipulation dated August 10, 1948, saving rights of appellant;

(f) Report verified August 11, 1948, of Special Guardian and Attorney for certain persons interested in income;



(g) Report verified July 30, 1948, of Special Guardian and Attorney for certain persons interested in principal;

(h) Stipulation waiving certification;

(i) Order of Surrogate's Court, New York County, dated March 28, 1949, entered on remittitur from Court of Appeals;

(j) Remittitur from Court of Appeals.

Dated: New York, N. Y., March 28th, 1949.

James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as as Trustee, etc. Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

It is so ordered, D. W. P.

[fols. 327-328] IN THE SURROGATE'S COURT FOR NEW YORK  
COUNTY

**STIPULATION WAIVING CERTIFICATION—April 8, 1949**

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the stipulation saving rights of appellant, dated August 10, 1948, the notice of appeal, the remittitur of the Court of Appeals, the order of the Surrogate's Court, County of New York, entered on said remittitur, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of New York and the stipulation dated March 28, 1949 and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated, New York, April 8th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

## [fol. 329] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF APPELLATE DIVISION DATED APRIL 28, 1949, AND ORDER ON REMITTITUR ENTERED THEREON—May 4, 1949

[Title omitted]

Please take notice that Kenneth J. Mullane as Special Guardian and Attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party, known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of said Appellate Division on April 28, 1949, and from the order on remittitur of the Appellate Division dated and entered in the Surrogate's Court, County of New York, on or about May 4, [fol. 330] 1949 (which order of the Appellate Division affirmed, one Justice dissenting, the final decree of the Surrogate's Court, New York County, made and entered in said Surrogate's Court on August 12, 1948, in a voluntary accounting proceeding and which final decree overruled two objections of the appellant addressed to the jurisdiction of said Surrogate's Court) and that this appeal is taken upon the law and the facts from so much of said orders as overruled said objections and adjudged that said Surrogate's Court had jurisdiction to settle petitioner's account of its proceedings as trustee and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law.

And upon said appeal, the appellant intends to bring up for review the intermediate decree made and entered in the office of the Clerk of the Surrogate's Court, New York County, on or about November 26, 1947, the intermediate order of the Appellate Division, First Judicial Department, dated June 21, 1948, affirming said intermediate decree, the order on remittitur from said Appellate Division entered in the office of the Clerk of said Surrogate's Court on August

12, 1948, and the final decree entered in the office of the Clerk of the Surrogate's Court, County of New York, on August 12, 1948, in so far as the same overruled said two certain objections and adjudged that said Surrogate's Court had jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken [fol. 331] herein under Section 100-c of the Banking Law constitute due process of law.

Dated: New York, N. Y., May 4th, 1949.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office & Post Office Address: 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York;

Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y. James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

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[fol. 332] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present—Hon. David W. Peck, Presiding Justice, Edward J. Glennon, Albert Cohn, Joseph M. Callahan, John Van Voorhis, Justices.

[Title omitted]

ORDER OF APPELLATE DIVISION DATED APRIL 28, 1949, APPEALED FROM

[fol. 333] An appeal having been taken to this court by Kenneth J. Mullane, as Special Guardian, etc., from so much of a decree of the Surrogate's Court of the County of New York, entered on the 12th day of August, 1948, as is stated in the notice of appeal,

And said appeal having been argued by Mr. Kenneth J. Mullane, appellant in person, by Mr. James N. Vaughan, respondent in person, and by Mr. Albert B. Maginnes of counsel for the respondent-trustee; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the decree, so far as appealed from, be and the same hereby is affirmed with costs. (One of the Justices dissents on his dissenting opinion In re Central Hanover Bank and Trust Company, as Trustee, respondent, 274 App. Div. 772.)

Enter:

George T. Campbell, Clerk.

[fol. 334] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

Present—Hon. William T. Collins, Surrogate.

[Title omitted]

ORDER ON REMITTITUR APPEALED FROM—May 3, 1949

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James M. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the [fol. 335] principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and



Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over inter vivos trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section [fol. 336] 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by the Court thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys and filed herein that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any deter-



mination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August [fol. 337] 11, 1948, respectively, wherein and whereby they approved petitioner's said first account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division, for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the proceedings taken herein under Section 100-c of the Banking Law constituted due process of law and said appeal having come on for argument before [fol. 338] the Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having

by order dated March 4, 1949, ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 of the Civil Practice Act and, as to the appeal from said order of the Appellant Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court and an order having been entered by this Court thereon on March 28, 1949, making said order of the Court of Appeals the order of this Court and said Kenneth J. Mullane, as such Special Guardian and Attorney having thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, pursuant to Section 592, subdivision 5 (e) of the Civil Practice Act, by notice of appeal, dated March 22, 1949, upon the facts and the law from so much of said final decree as overruled his said objections and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order, dated April 28, 1949, [fols. 339-340] wherein it ordered and adjudged (Van Voorhis, J., dissenting) that said final decree be affirmed with costs and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court and it appearing that a further appeal herein to the Court of Appeals is contemplated and that it is desirable and in order that all questions relating to the fees, costs and allowances to which any of the parties hereto or their attorneys may be entitled be reserved until the outcome of said further appeal.

Now, upon motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustee, as aforesaid, it is

Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered on on April 28, 1949, be and the same hereby is made the order of this Court; and it is further

Ordered that all questions relating to the fees, costs and allowances to which any of the parties hereto or their at-

torneys may be entitled by reason of any proceedings either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, or in the Court of Appeals be and they hereby are reserved for a supplemental decree to be entered herein.

William T. Collins, Surrogate.

Filed—N. Y. County Surrogate's Court, May 4, 1949.

[fol. 341] IN SURROGATE'S COURT FOR NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF  
APPELLATE DIVISION DATED JUNE 21, 1948—April 11,  
1949

SIRS:

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed [fol. 342] (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, in a voluntary accounting proceeding, made and entered in said Surrogate's Court on the 26th day of November, 1947, which intermediate decree of said Surrogate's Court overruled two objections of the appellant addressed to the jurisdiction of the said Surrogate's Court.

This appeal is taken pursuant to leave granted by the said Appellate Division by an order dated March 29, 1949, and entered in the office of the Clerk thereof on April 7,

1949, by which order the following questions were certified to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

Dated: New York, N. Y., April 11th, 1949.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney for certain persons interested in income, appearing specially, Office & Post Office Address: 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York:

Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 344] IN THE SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 29 day of March, 1949.

Present—Hon. Edward J. Glennon, Justice Presiding; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. John Van Voorhis, Hon. Bernard L. Shientag, Justices.

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF AP-  
PEALS—Filed April 7, 1949

[fol. 345] An appeal having been taken in this Court by Kenneth J. Mullane as Special Guardian and Attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, from an Intermediate Decree of voluntary accounting of the Surrogate's Court, of the County of New York, dated November 26th, 1947;

And said Decree having been affirmed (one of the Justices dissenting) by an Order of this Court entered herein on the 21st day of June, 1948;

And an appeal, taken by the above named appellant to the Court of Appeals from said Order of this Court, without permission, having been dismissed by the Court of Appeals by an Order dated and entered on the 4th day of March, 1949, on the ground that said Order is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution;

And the above named appellant having thereupon, by Notice of Motion and Affidavit sworn to on March 17th, 1949, moved for leave to appeal to the Court of Appeals from said Order of this Court;

Now, upon reading and filing the Notice of Motion with proof of due service thereon, and the Affidavit of Ken-



neth J. Mullane, in support of said motion, and no one [fol. 346] appearing in opposition thereto, and, after hearing Mr. Kenneth J. Mullane for the motion,

It is hereby ordered that the said motion be, and the same hereby is granted and this Court hereby certifies that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals as follows:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

Enter.

A. C.

Filed April 7, 1949.

[fol. 347] AFFIDAVIT OF NO OTHER OPINION—May 12, 1949

STATE OF NEW YORK,

County of New York, ss: ..

Kenneth J. Mullane, being duly sworn, says:

I am Special Guardian and Attorney for certain persons interested in income, appearing specially, and am appellant herein and am familiar with all the proceedings herein.

No opinion was delivered by the Appellate Division in making the order of April 28, 1949, except the following memorandum:

"Decree, so far as appealed from, affirmed, with costs.  
(Van Voorhis, J., dissents on his dissenting opinion

[In re Central Hanover Bank & Trust Co., as trus., res.,  
274 App. Div. 772)] No opinion. Order filed."

Kenneth J. Mullane.

Sworn to before me this 12th day of May, 1949.<sup>3</sup>

Douglas A. Witschieben, Notary Public, State of  
N. Y. No. 41-4316550. Qualified in Queens County,  
Cert. filed with Queens & N. Y., Kings & West'r  
Co. Clk's & Reg. Commission expires March 30,  
1951.

[fol. 348] IN COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD—May 12, 1949

It is hereby stipulated and agreed, by and between the undersigned as follows:

1. That the appeal taken herein, by Notice of Appeal [fol. 349] dated May 4, 1949, from the order of the Appellate Division, First Judicial Department, dated and filed April 28, 1949, affirming the Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948, and from the order of the Surrogate's Court, New York County, entered on May 4, 1949, on the remittitur of the Appellate Division, First Judicial Department shall be argued with the appeal taken herein by Notice of Appeal dated April 11, 1949 from the order of the Appellate Division, First Judicial Department dated and entered on June 21, 1948, from which leave to appeal was granted by order of the Appellate Division, First Judicial Department, dated April 7, 1949.

2. Said appeals shall be argued on the basis of the Records on Appeal previously filed in this Court in connection with the argument of the appeals heretofore taken to this Court from the order of the Appellate Division dated June 21, 1948, the order on remittitur thereon entered in the Surrogate's Court, New York County on August 12, 1948, and the final Decree of the Surrogate's Court, New York County, dated August 12, 1948 and on Supplemental

Briefs and on a Supplemental Record on Appeal, the former Record on Appeal and the Supplemental Record, together constituting the Record on Appeal herein.

3. Said Supplemental Record on Appeal shall consist of the following documents:

(a) Statement under Rule 234

(b) Stipulation as to Record

[fol. 350] (c) Stipulation waiving Certification

(d) As to the appeal from the order of the Appellate Division dated April 28, 1949, affirming the final decree of the Surrogate's Court, New York County:

1. Notice of Appeal to Court of Appeals dated May 4, 1949.

2. Order of Appellate Division dated April 28, 1949.

3. Order on Remittitur dated May 3, 1949 on the order of the Appellate Division, dated April 28, 1949.

4. Notice of Appeal to Appellate Division dated March 22, 1949.

5. Order of Surrogate's Court, New York County, dated August 11, 1948, on the remittitur from the Appellate Division.

6. Final Decree of Surrogate's Court, New York County, dated August 12, 1948.

7. Stipulation dated August 10, 1948, saving rights of appellant.

8. Report, verified August 11, 1948, of Special Guardian and Attorney for certain persons interested in income.

9. Report, verified July 30, 1948, of Special Guardian and Attorney for certain persons interested in principal.

10. Order of Surrogate's Court, New York County, dated March 28, 1949, entered on remittitur from Court of Appeals.

11. Remittitur from Court of Appeals dated March 3, 1949.

[fol. 351] (e) As to the appeal to the Court of Appeals, pursuant to leave granted by order of the Appellate Division, dated March 29, 1949 and filed April 7, 1949:

1. Notice of Appeal to Court of Appeals dated April 11, 1949.

2. Order granting leave to appeal dated March 29, 1949.

Dated: New York, N. Y., May 12th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as Trustee, as Trustee Respondent. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fol. 352] STIPULATION WAIVING CERTIFICATION OF RECORD TO  
COURT OF APPEALS—May 12, 1949

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Supplemental Record on Appeal to the Appellate Division, First Department; the Order of Affirmance; the Order of Remittitur and the Notice of Appeal to the Court of Appeals from said orders; the Order of the Appellate Division dated June 21, 1948, and the Notice of Appeal to the Court of Appeals from said order, all of which are on file in the office of the Clerk of the Surrogate's Court of the County of New York and the Order of the Appellate Division, First Department granting leave to appeal which is on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated: New York, N. Y., May 12th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as Trustee, as Trustee Respondent. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fol. 353] IN THE COURT OF APPEALS OF NEW YORK

Witness: The Hon. John T. Loughran, Chief Judge,  
Presiding: John Ludden, Clerk.

REMITTITUR—June 3, 1949

In the Matter of the Judicial Settlement &c. of CENTRAL  
HANOVER BANK AND TRUST COMPANY, as Trustee, &c.

KENNETH J. MULLANE, as Special Guardian &c., Appellant,  
CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee  
&c., and James N. Vaughan, as Special Guardian &c.,  
Respondents

Be it remembered that on the 13th day of May in the year  
of our Lord one thousand nine hundred and forty-nine  
Kenneth J. Mullane, as Special Guardian &c. the appel-  
lant in this cause came here unto the Court of Appeals, in  
[fol. 354] person, and filed in the said Court a Notice of  
Appeal, return and supplemental return thereto from the  
order of the Appellate Division of the Supreme Court in and  
for the First Judicial Department. And Central Hanover  
Bank and Trust Company, as Trustee &c. and James N.  
Vaughan, as Special Guardian &c., the respondents in said  
cause, afterwards appeared in said Court of Appeals by  
Rathbone, Perry, Kelley & Drye, and James N. Vaughan,  
in person, attorneys. Which said Notice of Appeal and the  
return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this  
cause argued by Mr. Kenneth J. Mullane, of counsel for  
the appellant, and by Messrs. Albert B. Maginnes and James  
N. Vaughan, of counsel for the respondents, brief filed by  
amicus curiae and after due deliberation had thereon,  
did order and adjudge that the order of the Appellate Divi-  
sion of the Supreme Court appealed from herein be and  
the same hereby is affirmed.

And it was also further ordered, that the record afore-  
said, and the proceedings in this Court, be remitted to the  
Surrogate's Court, New York County, there to be proceeded  
upon according to law.

Therefore, it is considered that the said order be affirmed,  
as aforesaid.

And hereupon, as well the Notice of Appeal and return  
thereto aforesaid as the judgment of the Court of Appeals



aforesaid, by it given in the premises, are by the said Court [fols. 355-356] of Appeals remitted into the Surrogate's Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof &c.

John Ludden, Clerk of the Court of Appeals of the  
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,  
Albany, June 3, 1949

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk, State of New York, Court of  
Appeals. (Seal.)

[fol. 357] IN THE SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION

Present: Hon. David W. Peck, Presiding Justice; Edward S. Dore, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, Justices.

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

KENNETH J. MULLANE, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents.

ORDER ON REMITTITUR—August 4, 1949

KENNETH J. MULLANE, as Special Guardian and Attorney [fol. 358] ney as aforesaid, having appealed to the Court of Appeals from the order of this Court dated and entered on June 21, 1948, pursuant to permission granted by order of this Court dated March 29, 1949 and entered on April

7, 1949, which order certified the following questions to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-e of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participation from *inter vivos* trusts?

3. Did the surrogate err as a matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having also appealed to the Court of Appeals from the order of this Court dated and entered on April 28, 1949 and from the order of the Surrogate's Court, County of New York, dated May 3, 1949 and filed May 4, 1949, entered on the remittitur of this Court, and the Court of Appeals having heard said Appeals, and having, by its order of June 3, 1949, ordered that the orders appealed from be affirmed with costs to the respondents and printing disbursements to the Appellant, payable out of the fund, and the Court of Appeals having answered the first and second questions certified in the affirmative, and the third question [fols. 359-360] certified in the negative, and the remittitur of the Court of Appeals having been filed in the office of the Clerk of this Court.

Now, on motion of Rathbone, Perry, Kelley & Drye, attorneys for the respondent, Central Hanover Bank and Trust Company, as Trustee, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and that the orders entered herein on June 21, 1948, and April 28, 1949, be and they hereby are, affirmed.

Enter F. J. G.

Clerk's Certificate to foregoing paper omitted in printing.

## [fol. 361] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

At a Surrogate's Court held in and for the County of New York, at the Hall of Records in said County, on the 22nd day of August, 1949.

Present: Hon. William T. Collins, Surrogate.

In the Matter of the Judicial Settlement of the Account of proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

## ORDER ON REMITTITUR—August 22, 1949

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane [fol. 362] having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on

the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from *inter vivos* trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over *inter vivos* trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon (Van Voorhis, J., dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by the Court thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys, and filed herein, that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any determination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and



said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August 11, 1948, respectively, wherein and whereby they approved petitioner's said first [fol. 364] account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court, and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only, and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division, for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto, and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the proceedings taken herein under Section 100-c of the Banking Law constituted due process of law, and said appeal having come on for argument before the [fol. 365] Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having by order dated March 4, 1949, ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on

August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 of the Civil Practice Act and, as to the appeal from said order of the Appellant Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court and an order having been entered by this Court thereon on March 28, 1949, making said order of the Court of Appeals the order of this Court, and said Kenneth J. Mullane, as such Special Guardian and Attorney having thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, pursuant to Section 592, subdivision 5 (c) of the Civil Practice Act, by notice of appeal, dated March 22, 1949, upon the fact and the law from so much of said final decree as overruled his said objections and said appeal having duly come on to be heard before said Court and said [fol. 366] Court having rendered its decision thereon and having entered its order, dated April 28, 1949, wherein it ordered and adjudged (Van Voorhis, J., dissenting) that said final decree be affirmed with costs and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court and an order dated May 3, 1949, and entered May 4, 1949, having been entered by this Court, making the order of the Appellate Division the order of this Court, and reserving all questions relating to fees, costs and allowances for the entry of a supplemental decree to be entered herein,

And Kenneth J. Mullane, Esq., as Special Guardian and Attorney as aforesaid, by notice of appeal dated May 4, 1949, having appealed to the Court of Appeals from the said order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered on April 28, 1949, and from the order of this Court entered on the remittitur of the Appellate Division, dated May 3, 1949 and entered May 4, 1949, and said appeal having come on for argument in the Court of Appeals on May 13, 1949 and said Court of Appeals having heard Kenneth J. Mullane, Esq., as Special Guardian and Attorney, appellant, James N. Vaughan, Esq., as Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for petitioner-respondent, and said Court after due deliberation had thereon, by order dated June 3, 1949, having ordered and

adjudged that the said orders appealed from be affirmed, and the remittitur of the Court of Appeals having been duly filed in this Court,

[fol. 367] And the Appellate Division of the Supreme Court, First Judicial Department, by order dated March 29, 1949 and entered April 7, 1949, having granted to Kenneth J. Mullane, Esq., as Special Guardian and Attorney as aforesaid, leave to appeal to the Court of Appeals from the order of the Appellate Division dated and entered on June 21, 1948, and said Appellate Division having certified the following questions to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as a matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

and Kenneth J. Mullane, Esq., as Special Guardian and Attorney for persons interested in income, appearing specially, having by notice of appeal dated April 11, 1949, appealed to the Court of Appeals from said order of the Appellate Division, First Judicial Department, dated June 21, 1948, and said appeal having come on for argument in the Court of Appeals on the 13th day of May, 1949, together with the appeal from the order of this Court dated May 3, 1949 and [fol. 368] having heard said Kenneth J. Mullane, Esq., as such Special Guardian and Attorney, appellant, James N. Vaughan, Esq., as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for petitioner-respondent, and said Court, after due deliberation had thereon, having, by order dated June 3, 1949, ordered and adjudged that the said order of the Appellate

Division of the Supreme Court be affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund and the said Court of Appeals having answered in the affirmative the first and second questions certified by the Appellate Division, and having answered in the negative the third question certified by the Appellate Division, and the remittitur of the Court of Appeals having been filed in the Appellate Division of the Supreme Court, First Judicial Department, on the 3rd day of August, 1949, and the said Appellate Division, by order dated August 4, 1949, and entered August 4, 1949, having made the said order of the Court of Appeals the order of said Appellate Division and a certified copy of said order of the Appellate Division having been filed in this Court on August 9, 1949,

And it appearing from the affidavit of J. Quincy Hunsicker, III, sworn to July 26, 1949, and filed herein that there is due petitioner the sum of \$503.30 for actual out of pocket disbursements incurred herein, that, except for said sum, the fees, costs and disbursements of the parties hereto or their attorneys for services rendered up to the date hereof to the extent not already fixed and allowed, have [fols. 368a-369] been paid from sources other than said Common Trust Fund, but that additional fees, costs and disbursements may still be incurred herein in the future.

Now, on motion of Rathbone, Perry, Kelley & Drye, attorneys for petitioners, it is

Ordered that the order of the Court of Appeals, dated June 3, 1949, affirming the order of this Court, be and the same hereby is made the order of this Court; and it is further

Ordered that the order of the Appellate Division, First Judicial Department, dated August 4, 1949, be and the same hereby is made the order of this Court, and it is further

Ordered that petitioner be and it hereby is allowed the sum of \$503.30 for its disbursements heretofore incurred in addition to the disbursements heretofore allowed, said sum being payable out of the principal of said Common Trust Fund; and it is further

Ordered that said allowance is in full satisfaction of any balance remaining due to any party herein or such party's attorneys for fees, costs and disbursements in respect of



any proceedings herein up to the date hereof, but that, in case of any future proceedings herein, jurisdiction is retained to fix and allow any fees, costs and disbursements in respect thereof in a supplemental order or decree.

William T. Collins, Surrogate.

[fol. 370] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA—August 25, 1949

To Mr. Justice Felix Frankfurter, Justice of the Supreme Court of the United States of America:

Your petitioner, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, respectfully shows:

(The numbers in brackets below refer to folios of the Record on Appeal to the Court of Appeals, those preceded by the letter "R" referring to the original Record and those preceded by "S.R." referring to the Supplemental Record.)

1. Appellee Central Hanover Bank and Trust Company, as [fol. 371] Trustee of its Discretionary Common Trust Fund No. 1, established and operated under and pursuant to Section 100-c of the Banking Law of the State of New York, (Ch. 687, L. 1937, as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944), on March 28, 1947, filed in the Surrogate's Court, County and State of New York, its first account of proceedings, as Trustee as aforesaid, together with its petition for the judicial settlement of said account and for further relief [R. 17-19, 600-601].

2. Pursuant to said Section 100-c, your petitioner, the appellant herein, was duly appointed by order of said Court, dated March 31, 1947, Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and each other party known and unknown who had not otherwise appeared in said proceeding, who had or might there-



after have any interest in the income of said Common Trust Fund [R. 59, 643].

3. Pursuant to said Section 100-c, appellee James N. Vaughan, was duly appointed by order of said Court, dated March 31, 1947, Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a Committee and each other party known and unknown who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the principal of said Common Trust Fund [R. 57-58, 642].

4. In said proceeding, your petitioner as Special Guardian and Attorney appeared specially and served his preliminary report and answer verified May 26, 1947, objecting to the jurisdiction of said Court upon the ground, among others [R. 163-168]:

[fol. 372] "That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

5. Said Court by its intermediate decree, dated November 26, 1947, overruled said objection of your petitioner and held, among other things, that [R. 66]

" . . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

6. Your petitioner appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, and said Appellate Division, by order dated June 21, 1948, affirmed said decree (one justice dissenting) [R. 580-587].

7. Thereafter, your petitioner filed his report, dated August 11, 1948, as such Special Guardian and Attorney [R.

676-711] (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection on any such appeal [R. 673-675]) and reasserted verbatim his objection quoted above and said objection was overruled again by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above [R. 663].

8. Your petitioner then appealed to said Appellate Division of the Supreme Court, First Judicial Department, from said final decree, which decree was affirmed (one justice dissenting) by order of said Appellate Division dated April 28, 1949 [S.R. 214-218].

9. Your petitioner then appealed to the Court of Appeals [fol. 373] from said order of the Appellate Division of the Supreme Court, First Judicial Department, dated June 21, 1948, affirming said intermediate decree [S.R. 242-248]. Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following [S.R. 257]:

"Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of 'due process of law' under the Federal . . . Constitution with respect to said persons?"

Petitioner also appealed to said Court of Appeals from said order of said Appellate Division, First Department, dated April 28, 1949, affirming said final decree [S.R. 206-212]. Said two appeals to the Court of Appeals were heard together. By final judgment of said Court of Appeals dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative. The remittitur of said Court of Appeals with the record in said case has since been filed in the office of the Clerk of the Surrogate's Court, New York County, in accordance with law, and there remains as final determination in said cause, except that the remittitur on said appeal taken by leave of said Appellate

Division was in accordance with law returned to said Appellate Division and there remains with a duplicate of said record as a final determination in said intermediate appeal.

10. Said Court of Appeals is the highest court of the State of New York in which a decision in said proceeding could be had.

11. In said proceeding, there is drawn in question the validity of a statute of the State of New York (namely, subdivision 12 of Section 100-c of the Banking Law) on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of the validity of [fol. 374] said statute.

12. Your petitioner verily believes that certain errors were committed to the prejudice of your petitioner, which errors are more fully set forth in the assignment of errors filed herein.

13. Application was made by petitioner on August 24, 1949 to Honorable John T. Loughran, the Chief Judge of the Court of Appeals of the State of New York, for an order allowing the said appeal, and said application was denied on August 24, 1949 by said Chief Judge of the Court of Appeals of the State of New York.

Wherefore, your petitioner prays for the allowance of an appeal from said Court of Appeals of the State of New York to the Supreme Court of the United States in order that said decision and final judgment of the Court of Appeals of the State of New York may be examined and reversed and also prays that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States as provided by law.

Kenneth J. Mullane, As Special Guardian and Attorney.

Dated: New York, N. Y., August 25, 1949.

*Duly sworn to by Kenneth J. Mullane. Jurat omitted in printing.*

[Title omitted]

## ASSIGNMENT OF ERRORS

Comes now Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, the appellant herein, and assigns as errors the following holdings of the Court of Appeals of the State of New York:

1. That subdivision 12 of Section 100-c of the Banking Law is not repugnant to the Constitution of the United States of America and does not deprive of property without due process of law any of the persons interested in the income of a Common Trust Fund and in the income of any estate, trust or fund part or all of which is invested in such Common Trust Fund.

[fols. 376-377] 2. That due service of a notice in compliance with said subdivision 12 is sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income of a Common Trust Fund and in the income of an estate, trust or fund part of which is invested in said Common Trust Fund.

3. That the Surrogate did not err as a matter of law in making the intermediate and final decrees on voluntary accounting in this cause which decrees dismissed said objection of appellant that notice given in compliance with said subdivision 12 is not sufficient to confer jurisdiction upon the Courts of the State of New York over persons interested in the income of said Common Trust Fund and is not sufficient to meet the requirements of "due process of law" under the Federal Constitution.

Dated: New York, N. Y., August 25, 1949.

Kenneth J. Mullane, Special Guardian and Attorney  
as aforesaid.

## [fol. 378] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

## ORDER ALLOWING APPEAL—August 27, 1949

Upon the petition of Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, dated August 25th, 1949, for an appeal in the above cause to the Supreme Court of the United States from the Court of Appeals of the State of New York and petitioner's assignment of errors and jurisdictional statement pursuant to the Rules of the Supreme Court of the United States, and it appearing therefrom and from the record in the above-entitled cause that there was drawn in question in said cause the validity of a statute of the State of New York on the ground of its [fols. 379-380] being repugnant to the Constitution of the United States and that the final decision and judgment of said Court of Appeals, the highest Court of said State in which a decision could be had in said cause, is in favor of the validity of said statute,

Now, therefore, it is

Ordered that said appeal be and it hereby is allowed as prayed for in said petition and that the Clerk of the Surrogate's Court, New York County, State of New York, shall within 30 days from the date hereof make, certify and transmit to the Supreme Court of the United States a transcript of the material parts of the record and proceedings in said cause which shall be designated by praecipe or stipulation of the parties in accordance with the Rules of the Supreme Court of the United States; and it is further

Ordered that appellant shall give a good and sufficient bond in the sum of \$200 00/100, that appellant shall prosecute said appeal to effect and shall answer all costs if said appellant shall fail to make his plea good.

Dated: August 27, 1949.

Felix Frankfurter, Associate Justice of the Supreme Court of the United States of America.

[fols. 381-383] Cost Bond on Appeal for \$200.00 approved Sept. 2, 1949, omitted in printing.

[fols. 384-388] Citation in usual form showing service on appellees, omitted in printing.



## [fol. 389] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

## STIPULATION AS TO RECORD ON APPEAL—August 31, 1949

It is hereby stipulated and agreed by and between the undersigned that the whole of the record herein is necessary for the consideration of this cause and that the whole of the record herein shall be included in the transcript of the record and proceedings in this cause which shall be made, certified and transmitted to the Supreme Court of the United States by the Clerk of the Surrogates Court, New York [fols. 390-391] County, State of New York, pursuant to the Order Allowing the Appeal herein, which order is dated August 27, 1949.

Dated: New York, N. Y., August 31, 1949.

Kenneth J. Mullane, As Special Guardian and Attorney as Aforesaid, Appellant; James N. Vaughan, As Special Guardian and Attorney as Aforesaid, Appellee; Rathbone, Perry, Kelley & Drye, Counsel for the Central Hanover Bank and Trust Co. as said Trustee, Appellee.

[fol. 392] Clerk's Certificate to foregoing transcript omitted in printing.

## [fols. 393-395] SUPREME COURT OF THE UNITED STATES OF AMERICA

## STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD AS REQUIRED BY RULE 13(9)—Filed October 11, 1949

Comes now the appellant and adopts its Assignment of Errors as a statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, Appellant.

[fol. 396] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1949

No. 378

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUES-  
TION OF JURISDICTION—November 7, 1949.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on Cover: Enter Kenneth J. Mullane, File No. 54,127, New York, Court of Appeals, Term No. 378. Kenneth J. Mullane, as Special Guardian and Attorney, etc., Appellant, *vs.* Central Hanover Bank and Trust Company, as Trustee, etc., et al. Filed October 7, 1949. Term No. 378 O.T. 1949.

(5438)

[fol. 242] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1949

No. 378

KENNETH J. MULLANE as Special Guardian and Attorney,  
etc., Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY as Trustee,  
etc., et al., Appellee; James N. Vaughan as Special  
Guardian and Attorney, etc., Appellee

Appeal from the Court of Appeals of the State of New  
York

STIPULATION AND ADDITION TO TRANSCRIPT OF RECORD

It Is Hereby Stipulated and Agreed by and between the  
attorneys for the respective parties that the annexed cer-  
tified copy of the Remittitur, dated June 3, 1949, from the  
Court of Appeals be and hereby is added and made a part  
of the transcript of the record in the above entitled cause.

Dated: December 29, 1949.

Kenneth J. Mullane, Special Guardian and Attorney,  
etc., Appellant; Albert B. Maginnes, Attorney for  
Central Hanover Bank and Trust Company as  
Trustee, etc., et al., Appellee; James N. Vaughan,  
Special Guardian and Attorney, etc., Appellee.

[fol. 243]

No. 341

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and forty-nine, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

Renittitur June 3, 1949.

[fol. 244] In the Matter of the Judicial Settlement, &c. of Central Hanover Bank and Trust Company, as Trustee, &c.; Kenneth J. Mullane, as Special Guardian, &c., Appellant; Central Hanover Bank and Trust Company, as Trustee, &c., and James N. Vaughan, as Special Guardian, &c., Respondents

Be It Remembered, That on the 13th day of May in the year of our Lord one thousand nine hundred and forty-nine, Kenneth J. Mullane, as Special Guardian &c., the appellant in this cause, came here unto the Court of Appeals, in person, and filed in the said Court a Notice of Appeal return and supplemental return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Central Hanover Bank and Trust Company, as Trustee &c., and James N. Vaughan, as Special Guardian &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Rathbone, Perry, Kelley & Drye, and James N. Vaughan, in person, attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth J. Mullane, of counsel for the [fol. 245] appellant, and by Messrs. Albert B. Maginnes and James N. Vaughan, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund. First and second questions certified answered in the affirmative. Third question certified answered in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs to the respondents and printing disbursements to the appellant &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of  
the State of New York.

[fol. 246] COURT OF APPEALS, CLERK'S OFFICE,  
Albany, June 3, 1949:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL  
DEPARTMENT

STATE OF NEW YORK,  
Clerk's Office:

In the Matter of the Judicial Settlement, etc., of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., Kenneth J. Mullane, as Special Guardian, etc., Appellant; Central Hanover Bank and Trust Company, as Trustee, etc., and James N. Vaughan, as Special Guardian, etc., Respondents

#### CERTIFICATION

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy of Order on Remit-



titur from the Court of Appeals, dated June 3, 1949, has been compared with the original thereof filed in this office on the 4th day of August, 1949, and that the same is a correct transcript thereof, and of the whole of the said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 29th day of December, 1949.

George T. Campbell, Clerk. (Seal.)

(5881)